No. 06-_____

In The
Supreme Court of the United States

MICHELANGELO DELFINO et al.,

Petitioners,

vs.

AGILENT TECHNOLOGIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Sixth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Communications Decency Act of 1996 (CDA) provide immunity for an "interactive computer service" as both a publisher and distributor of content on the Internet as four circuits have held, or only as a publisher as Judge Easterbrook and the Seventh Circuit have suggested? In other words, can an "interactive computer service" be liable for the failure to take action to remove tortious publications published by others using their "interactive computer service" even after receiving notice of such publications?

2. Is any employer that gives its employees access to the Internet through the employer's internal computer system an "interactive computer service," such that it has immunity from tort liability under the CDA, as the California Court of Appeal has held, or must an "interactive computer service" be an entity in the business of providing Internet access, as other courts have impliedly held?

3. Does CDA immunity extend to publication and non-publication torts, as the California Court of Appeal has held, or are non-publication torts outside the scope of CDA immunity, as other courts have impliedly held?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were plaintiffs Michelangelo Delfino and Mary E. Day, and defendants Agilent Technologies, Inc. and Cameron A. Moore. A separate judgment in favor of Delfino and Day against defendant Moore is not the subject of this petition.

SUPREME COURT RULE 29.6 STATEMENT

This petition is filed on behalf of two individuals and therefore does not involve any corporation subject to the Supreme Court Rule 29.6 corporate disclosure statement.

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PETITION FOR A WRIT OF CERTIORARI

Michelangelo Delfino and Mary E. Day respectfully petition for a writ of certiorari to review the decision in this case of the Court of Appeal of California, Sixth Appellate District.

OPINIONS BELOW

The unreported March 18, 2005 order of the Superior Court of the State of California, County of Santa Clara, granting Agilent's motion for summary judgment is reproduced in the appendix (Pet. App.) at 41-43. The reported December 14, 2006 opinion of the Court of Appeal of the State of California, Sixth Appellate District, is reproduced at Pet. App. 1-40. The unreported February 28, 2007 order of the Supreme Court of California denying petitioners' petition for review from the Court of Appeal's opinion is reproduced at Pet. App. 44.

JURISDICTION

The California Court of Appeal opinion that is the subject of this petition was filed on December 14, 2006. Pet. App. 1. On February 28, 2007, the California Supreme Court denied petitioners' timely petition for review. Pet. App. 44. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) (2005).

STATUTORY PROVISION INVOLVED

The Communications Decency Act provides:

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States –

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "good samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene,

lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on Communications Privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

47 U.S.C. § 230 (2005).

STATEMENT OF THE CASE

A. Moore's Internet threats against Delfino and Day.

In 2002, while petitioners Michelangelo Delfino and Mary E. Day (Delfino and Day) were involved in litigation that ultimately culminated in a California Supreme Court opinion in *Varian Medical Systems, Inc. v. Delfino,* 106 P.3d 958 (2005), Delfino and Day received a series of threats over the Internet – via email to Delfino and postings on a Yahoo! Inc. message board for one of the *Varian* corporate

plaintiffs[1] – attacking Delfino and Day for their conduct in the *Varian* litigation. The perpetrator used pseudonyms – most often "crack_smoking_jesus." The threats were ugly and frightening. For example:

- It's coming, motherfucker, and you won't see it. I seriously hope you have health insurance because you're going to get your ass stomped by me and some friends. . . . You can look forward to all of your fingers getting broken, several kicks to the ribs and mouth, break some teeth, and a cracked head. Also, your car will be trashed and your computer destroyed. Maybe set your place on fire . . . If your cunt is there, she'll take a little ride to the parts of San Jose where they don't speak english [*sic*] . . . Die, motherfucker. You'll wish you had. Clerk's Transcript[2] (CT) 853.
- Mikey is going to DIE real soon. CT 871.
- I heard Mikey will have a hard time appealing his case after he's DEAD. CT 875.

Delfino and Day suspected that the source of the threats was an Agilent employee named Cameron A. Moore, and reported the threats to the FBI. CT 1124-26, 1128-30.

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[1] Yahoo! Inc. maintains Internet message boards for online discussion of various publicly traded corporations.

[2] The Clerk's Transcript is part of the record on file with the California Court of Appeal.

B. The FBI and Agilent investigations of Moore.

A grand jury issued a subpoena for subscriber information from Yahoo! Inc. on the Internet screen name "crack_smoking_jesus" and two other screen names. The information revealed an Agilent IP address. CT 574. In late July 2002, the FBI asked Agilent to identify the user of that address. CT 437-38. Agilent's internal investigation revealed that the user was its employee Moore. CT 366.

On July 30, 2002, Agilent informed the FBI that it had identified Moore as the user of the Agilent IP address from which emails had been sent by "crack_smoking_jesus." CT 366, 575. The FBI then told Agilent that "Delfino and Day had received some potentially threatening emails that appeared to come from Moore." CT 367.

During the next week, Agilent investigated Moore's use of Agilent's internal computer system and identified the Internet sites Moore had visited in July 2002. CT 370, 386, 388; *see also* CT 546. Agilent discovered two emails stored on Moore's computer that contained threatening language about Delfino and Day. CT 386-87, 583.

On August 12, 2002, Agilent personnel met with Moore, who admitted making threats against Delfino and Day but denied having done so through Agilent's internal computer system. CT 391. Later that day, Moore gave Agilent a copy of a letter he had sent to the San Jose United States Attorney's Office dated August 6, 2002, in which Moore confessed to threatening Delfino but promised not to do it again. CT 554-62.

Agilent's further review of its records showed that in July 2002 Moore had visited the Yahoo! Inc. message board for one of the *Varian* corporate plaintiffs through the company's internal computer system. *See* CT 370, 388,

546. On the dates Moore visited the message board, several threatening postings by "crack_smoking_jesus" appeared. *See* CT 890-92, 1121.

In late October 2002, Agilent learned of new pseudonymous postings on Yahoo! Inc.'s message board for Agilent that claimed death threats had been "traced to" and came "from inside" Agilent. CT 393, 597-98. And in early February 2003, Agilent personnel obtained an internal Internet Activity Report on Moore for January 2003, which revealed continuing multiple visits by Moore to the Varian message board. CT 394, 600-11. Even so, Moore remained an Agilent employee.

C. Moore's arrest, conviction, and termination from Agilent.

Following the August 2002 investigations, Moore continued to threaten Delfino and Day via pseudonymous Internet postings, despite his promise to the federal prosecutor to cease doing so. CT 575, 1131-32.

Moore was arrested on February 14, 2003, and was charged with a felony – transmission of threats in interstate commerce. 18 U.S.C. § 875(c)(g) (2005), CT 570, 912. On September 19, 2003, pursuant to a negotiated disposition, Moore pleaded guilty to a misdemeanor – harassment intended to dissuade another person from assisting a criminal prosecution, 18 U.S.C. § 1512(d)(4) (2005), – based on a message-board threat he had posted on November 22, 2002. CT 1047, 1086-90. Moore was placed on probation for four years, including six months of home confinement with electronic monitoring. CT 1048.

Agilent did not terminate Moore's employment until April 30, 2003.

D. The proceedings below.

Delfino and Day sued Agilent and Moore for intentional and negligent infliction of emotional distress.[3] CT 1-12. Agilent moved for summary judgment, asserting among other things that (1) the CDA immunizes Agilent from liability, and (2) as a matter of state law Agilent is not liable for the threats Moore made through Agilent's computer network. CT 65. The trial court ruled that the CDA immunizes Agilent from liability and granted summary judgment for Agilent on that basis alone. CT 1793.

The case went to trial solely as to Moore, who did not appear. Reporter's Transcript (RT) 15.[4] The court rendered judgment against Moore in the sum of $487,323 compensatory damages and $600,000 punitive damages. RT 46-48.

Delfino and Day appealed the summary judgment for Agilent. CT 1812. The Court of Appeal affirmed, holding that "Agilent was an interactive computer service provider" under the CDA and thus "was immune from liability for alleged damages arising out of the cyberthreats transmitted by its employee, Moore." Pet. App. 2; *see also* Pet. App. 14-17. Although the trial court had restricted its ruling to the immunity issue, the Court of Appeal also held "further that plaintiffs did not make a prima facie showing to support a claim against Agilent under theories of ratification, respondeat superior, or negligent supervision/

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[3] Delfino and Day litigated this case in propria persona through rendition of judgment in the Court of Appeal.

[4] The Reporter's Transcript is part of the record on appeal on file with the California Court of Appeal.

retention." Pet. App. 2. The California Supreme Court denied review. Pet. App. 44. This petition follows.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTING INTERPRETATIONS OF THE COMMUNICATIONS DECENCY ACT.

A. This Court's attention is warranted by several significant splits in authority on whether the CDA immunizes employers from liability for their employees' abuse of employer-provided Internet access.

A decade ago, on the cusp of the Internet's astonishing growth, people who wanted access to the Internet used companies like America Online, which were in the nascent business of providing customers with Internet access. A new acronym was born – "ISP," for "Internet service provider."

In 1996, Congress gave ISPs immunity against certain tort liability through two prescriptions:

- "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).
- "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

As explained in greater detail in the subsections that follow, during the past decade courts nationwide have offered conflicting interpretations of the scope of the immunity afforded by these immunity provisions. First, following the lead of *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), many courts (including the California Court of Appeal here, Pet. App. 13-17), have held that the immunity afforded by § 230(c)(1) broadly applies to both publisher and distributor theories of liability. That is, an "interactive computer service" has full immunity for any tort liability arising from materials published or distributed over the Internet even where it has been given prior notice of their tortious content and has been provided with an opportunity to stop the distribution. By contrast, the Seventh Circuit, a three-justice dissent in the Florida Supreme Court, and numerous academics have stated that § 230(c)(1)'s immunity extends only to potential liability arising out of "'Good Samaritan' blocking and screening of offensive material," and does not afford immunity to an "interactive computer service" that distributes tortious material, especially after receiving notice and an opportunity to stop the distribution.

Second, every prior opinion addressing the scope of CDA immunity, including *Zeran*, has found that an "interactive computer service" means an entity such as America Online or Earthlink that is in the *business* of providing access by multiple users to a computer server. The Court of Appeal below departed from that consensus, holding that any employer providing Internet access to its employees (very likely the majority of businesses in the country) is an "interactive computer service," and thus immune from torts committed by their employees via the Internet using work computers. Pet. App. 17-20.

Third, every prior CDA opinion has held that the § 230(1) immunity applies only to publication torts. By contrast, the Court of Appeal's opinion held that the CDA immunity protects employers from liability even for non-publication torts such as negligent supervision/retention – so long as those torts are committed exclusively by means of Internet access provided by the employer. Pet. App. 20-23.

Each holding by the Court of Appeal regarding CDA immunity raises important questions for a nation whose dependence on Internet communications is expanding annually on an exponential basis. Each holding is not only in conflict with decisions from other courts, but also with Congress's purpose in enacting the CDA.

For example, the CDA itself made clear that when it came to giving immunity to ISPs – which the CDA calls "interactive computer services" – Congress's intent was to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

But Congress also intended "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and ... to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." 47 U.S.C. § 230(b)(4) & (5). Indeed, the title of the section of the statute at issue here is "Protection for 'good samaritan' blocking and screening of offensive material." 47 U.S.C. § 230(c).

By 2002, fifty-five million people accessed the Internet from work. John B. Horrigan & Lee Rainies, Pew Internet & American Life Project, Getting Serious Online 2, 6-8 (2002) http://www.pewinternet.org/pdfs/PJP_Getting_Serious_Online3ng.pdf. A recent survey indicates that use of the Internet at work is increasing as seventy-four percent of employers nationwide now provide Internet access to their employees. Press Release, Metlife, Metlife Study Reveals that California Leads the Nation in Employee Access to Online Benefits Tools (Aug. 8, 2006.) http://www.Metlife.com (follow "Public Relations" hyperlink, then follow "General News: 2006 and 2007 Press Releases" hyperlink). A recent survey of 10,688 employees revealed that seventy-eight percent accessed the Internet for personal use while at work. IT Business Edge, Burstek Releases 2005 Internet Usage Study, http://www.itbusinessedge.com/item/?ci=13931 (last visited May 8, 2007).

Nearly three quarters of American employers engage in some form of monitoring of their employees' use of the Internet at work. Am. Mgmt. Ass'n, Workplace Monitoring & Surveillance 1 (2001) http://www.amanet.org/research/pdfs/ems_short2001.pdf. Indeed, employers are in a much easier position to monitor employee Internet use than companies in the business of providing Internet access to millions, because "individuals do not face the massive volume of third-party postings that providers encounter. Self-regulation is a far less challenging enterprise for them." *Barrett v. Rosenthal*, 146 P.3d 510, 526 (Cal. 2006).

Many software companies today do a brisk business selling content-monitoring technology for employers to keep track of their employees' Internet use. David Smith, Managing Internet Access for the Enterprise (2006) http://www.webpronews.com/expertarticles/expertarticles/wpn-62-20060410

ManagingInternetAccessfortheEnterprise.html (describing a "new generation" of content-filtering software that "has now emerged to provide precision control over all [employee] Internet usage"). A 2006 survey showed that thirty-seven percent of American companies with one thousand or more employees and forty-three percent of those with 20,000 or more employees "had deployed a technology solution for monitoring content in webmail," and an additional twenty-four percent "said that they intend to deploy such technology in the next twelve months." *See* Proofpoint, Outbound Email and Content Security in Today's Enterprise (2006) http://www.proofpoint.com/downloads/Proofpoint-Outbound-Email-and-Content-Security-2006.pdf.

Such monitoring can be warranted. Delfino and Day are not alone in being the victims of online tortious conduct committed by employees using workplace computers. Of 294 American companies with one thousand or more employees, the employers estimated that some twenty-two percent of email sent through their internal computer systems "contains content that poses a legal, financial or regulatory risk" such as hate speech, pornography and private information. *See* Proofpoint, *supra*, at 1, 4. Nearly a third of those companies had terminated an employee for violating internal email policies during the previous twelve months. *Id.* "With the push of a button, employees can distribute confidential records worldwide in a matter of minutes, peruse pornography over the Internet from their office computer, or send sexually harassing messages via e-mail, chat rooms, or news groups." Caitlin, Garvey, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology,* 25 U. Dayton L. Rev. 133, 134 (1999) (footnotes omitted).

The next sections of this petition explain the nationwide split of authority as to each of the three primary holdings of the Court of Appeal interpreting § 230(c)(1) of the CDA, necessitating this Court's involvement to resolve the conflicts.

B. This Court should resolve a split of authority on whether an interactive computer service has immunity for its role as an online distributor of tortious material.

The California Court of Appeal in this case, relying on, among other cases, *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) and the California Supreme Court's opinion in *Barrett v. Rosenthal*, 146 P.3d 510 (2006), held that the CDA provides immunity for both publishers and distributors of online tortious material. Pet. App. 17.

In *Zeran*, 129 F.3d at 330-32, the Fourth Circuit interpreted the language of § 230(c)(1) that "[n]o provider or user of an interactive computer service shall be treated as the *publisher*" to mean that immunity is afforded both for what it labeled "publisher" liability – "the choice by an author to include certain information" and for what it labeled "distributor" liability – "both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party." *Id.* at 332 (italics added).

Other circuits and state courts have reached the same conclusion. *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003); *Green v. America Online (AOL)*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Barrett v. Rosenthal,* 146 P.3d at 525-26.

By contrast, the Seventh Circuit, in an opinion by Judge Easterbrook, has rejected *Zeran*'s interpretation of § 230(c)(1). The Seventh Circuit points out that interpreting § 230(c)(1) as granting a broad scope of immunity to interactive computer services would be contrary to the purpose of the CDA:

> If [*Zeran*'s] reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c) – which is, recall, part of the "Communications Decency Act" – bears the title "Protection for 'Good Samaritan' blocking and screening of offensive material," hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?

Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003). The Seventh Circuit suggests that, in contrast to the holding in *Zeran*, courts should "read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption." *Id.* Consequently, "§ 230(c)(1) forecloses any liability that depends on deeming the ISP a 'publisher' . . . while permitting the states to regulate ISPs in their capacity as intermediaries." *Id.*

In a 4-3 opinion in the Florida Supreme Court accepting the *Zeran* rationale, the three-justice dissent vigorously argued that *Zeran* was wrongly decided:

> Contrary to the majority's view, however, the carefully crafted statute at issue . . . does not reflect an intent to totally exonerate and insulate an ISP from responsibility where, as here, it is alleged that an ISP has acted as a knowing distributor of material leading to the purchase, sale, expansion and advancement of child pornography, after having been given actual notice of the particular activity, by taking absolutely no steps to curtail continued dissemination of the information by its specifically identified customer, when it had the right and power to do so. . . . Through the majority's interpretation, the so-called "Decency Act" has, contrary to well-established legal principles, been transformed from an appropriate shield into a sword of harm and extreme danger which places technology buzz words and economic considerations above the safety and general welfare of our people.

Doe v. America Online, Inc., 783 So.2d 1010, 1019 (Fla. 2001) (Lewis, J., dissenting).

The Eleventh Circuit has now acknowledged this conflict in the interpretation of § 230(c)(1):

> We note that the majority of circuits also read subsection (c)(1), though phrased as a definition, to block civil liability when interactive service providers refrain from filtering or censoring the information on their sites. [Citations.] In contrast, the Seventh Circuit determined that the CDA is not necessarily inconsistent with state laws that create liability for interactive service

> providers that refrain from filtering or censoring content.

Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 n.3 (11th Cir. 2006).

Further attention has been drawn to this conflict by commentators:

> As stated earlier, the *Zeran* decision has become a powerful precedent in interpreting the CDA, but it is not without its critics. In *Doe v. GTE Corp.*, the Seventh Circuit considered the *Zeran* interpretation on the CDA. . . . In its view, *Zeran* is flawed in that its broad interpretation frustrates the CDA's stated purpose of encouraging self-regulation by ISPs by granting immunity whether or not they regulated their services. . . . Like the Seventh Circuit, several state courts have found reason to criticize *Zeran*. While the Florida Supreme Court affirmed a lower court's acceptance of *Zeran* . . . the dissent offered a detailed criticism of *Zeran*.

Joseph Dowling, *Noah v. AOL Time Warner: Are There Legitimate Barriers to Civil Rights Protection on the Internet?*, 14 Alb. L.J. Sci. & Tech. 775, 785 (2004); *see also Developments in the Law – The Law of Cyberspace*, 112 Harv. L. Rev. 1574, 1613 (1999) (*Zeran* "based its holding on a questionable interpretation of the word 'publisher,' stating that 'distributor' was merely a subset of the word 'publisher' ").

This Court should resolve the split in authority and provide a consistent rule to be applied nationwide regarding the scope of § 230(c)(1) of the CDA.

C. This Court should resolve a split of authority on whether an employer that gives employees access to the Internet through the employer's internal computer system is treated as an interactive computer service for purposes of CDA immunity.

By bringing within the ambit of CDA immunity every employer that gives its employees Internet access (Pet. App. 17-20), the Court of Appeal's opinion conflicts with opinions from other jurisdictions that have thus far carefully limited the application of CDA immunity to actual market providers of Internet services. The CDA defines "interactive computer service" as "any information service, system, or access software *provider* that provides or enables computer access by multiple users to a computer server. . . ." 47 U.S.C. § 230(f)(2) (italics added).

Other jurisdictions apply the CDA's immunity for interactive computer services *restrictively* to entities that are in the business of providing access by multiple users to a computer server, such as companies like America Online and numerous Internet websites. *See, e.g., Zeran,* 129 F.3d at 332 [affording immunity to interactive computer services "'in the business'"]; *Batzel,* 333 F.3d at 1028 n.12 [stating interactive computer service "provides its *subscribers* with access to the Internet. Such service providers include, for example, America Online, commonly referred to as 'AOL,' and Earthlink, as well as numerous other providers"].

Nothing in the CDA indicates Congress meant to treat employers as ISPs. Rather, the CDA is silent on the point. One commentator says the issue "is shrouded in ambiguity" and "no statute specifically addresses corporations with direct Internet connections." Garvey, *supra*, 25 U. Dayton L. Rev. at 134, 139. The CDA's failure to mention

employers "raises the troubling question of whether Congress intended to consider corporations with direct Internet connections as something other than ISPs. No express answer exists, and the legislative history is silent, although it is probable that Congress did not even consider the likelihood that many corporations would have direct Internet connections during the [CDA's] formation." *Id.* at 150. Another commentator says that the CDA's language was "originally tailored" for "traditional providers of Internet and e-mail services" such as American Online, CompuServe and Prodigy. Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online Is a Good Thing*, 6 Rich. J.L. & Tech. 25, *2 n.11, *18 (2000).

The history of the CDA's enactment shows that, by "interactive computer services," Congress meant those in the business of providing Internet access, not garden-variety employers. "Congress adopted § 230(c) [of the CDA] to overrule the decision of a New York state court in *Stratton Oakmont*. . . . *Stratton Oakmont* held that Prodigy, an Internet access provider that ran a number of bulletin boards, could be held responsible for libelous statements posted on its 'Money Talk' bulletin board by an unidentified person." *Batzel,* 333 F.3d at 1029; *see also* Dowling, *supra*, at 781 [noting that subdivision (c)(1) was added by amendment, without any committee hearing, three months after the *Stratton* decision]. The key part of the *Stratton* opinion was its holding that "[c]omputer bulletin boards should generally be regarded in the same context as bookstores, libraries, and network affiliates." *Stratton Oakmont, Inc. v. Prodigy Services Co.,* 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995). Section 230(c) must be read in light of its purpose – to override a decision

dealing with market participants that are in the business of providing access to the Internet as a whole or to specific forums within the Internet.

Given this purpose of the CDA, it is evident that Congress did not intend to immunize employers from liability merely because they provide their employees with access to the Internet. Employers have various state-imposed legal obligations with respect to regulating speech in the workplace – for example, the duty to prevent the creation of a work environment that is hostile to women or minorities. In contrast, Congress has made a policy decision *not* to impose similar obligations on participants in the market for providing Internet services, by giving them immunity from liability. In doing so, Congress could not possibly have intended to extend that immunity to employers, thereby extinguishing many of their state-sanctioned duties.

Extending the CDA's immunity to employers who give their employees Internet access would actively *discourage* self-regulation through the development and utilization of content-monitoring software. If given such immunity, "an employer need not take any proactive step" to prevent an employee's commission of a tort over the Internet through the employer's internal computer system; consequently, "employers will allow employees to say and post anything, since employers will be immune from liability." Spencer, *supra*, 6 Rich. J.L. & Tech. at *18-20. "This turn of events is contrary to the congressional intent of the CDA, which is to give providers and users incentive to self-regulate." *Id.* at *20. Unlike the huge traditional ISPs, employers can self-regulate with content-monitoring software, and non-immunity for employers provides an incentive for such self-regulation. A grant of certiorari is warranted to

resolve this decisional conflict and to provide consistent guidance to litigants and the lower courts.

D. This Court should resolve a split of authority on whether, even if an employer like Agilent has CDA immunity, the immunity extends to non-publication torts such as negligent supervision/retention of an employee.

Even if the Court of Appeal were right in concluding that Agilent has CDA immunity, the court created an additional split of authority by holding that the immunity applies to all the non-publication torts implicated by this lawsuit. Pet. App. 20-23.

The CDA's immunity provisions state that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The CDA thereby "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.'" *Gentry v. eBay, Inc.*, 121 Cal.Rptr.2d 703, 713 (2002) (quoting *Zeran*, 129 F.3d at 330).

One of the tort theories in this case is Agilent's negligent supervision/retention of Moore. Pet. App. 26. As the Court of Appeal correctly observed, this tort "is one of direct liability for negligence, not vicarious liability" (Pet. App. 34), consisting of "negligently hiring, supervising, or retaining an unfit employee." *Doe v. Capital Cities*, 58 Cal.Rptr.2d 122, 132 (1996). The tort is *not* one of

publication – that is, it does not depend on treatment of the employer as a publisher or speaker of information provided by the employee.

All other authorities hold while CDA immunity is not limited to defamation, its application extends only to torts that arise from a publication. *E.g.*, *Zeran,* 129 F.3d at 332; *Gentry,* 121 Cal.Rptr.2d at 713-14. The Court of Appeal's opinion conflicts with these authorities – and ultimately with the CDA's text, which affords immunity to an ISP only in its role as "publisher or speaker." 47 U.S.C. § 230(c)(1).

A grant of certiorari is warranted to resolve this conflict. This is an important issue because, if CDA immunity did extend to non-publication torts like negligent supervision/retention, employers would be free to countenance harmful conduct committed by employees solely through the employer's internal computer system, such as sexual and racial harassment, invasion of privacy, fraud, and identity theft. For example, under the Court of Appeal's analysis, an employer would be immune from liability for a supervisory employee's sexual or racial harassment of a subordinate, so long as it was conducted solely via abusive email sent through the company's internal computer system. The potential for perpetuating unlawful employee behavior would be vast.

E. The Court of Appeal's opinion is not supported by an adequate and independent state ground.

The Court of Appeal's opinion purports to find both that petitioners' action is barred by the CDA under federal law and that the evidence does not support any claims under state law. Pet. App. 23-39.

In order for the opinion to rest on an adequate state ground, "the question the Court must ask is whether the same judgment would be rendered by the state court after the Court has corrected any error in its view of federal law. If the answer is in the affirmative, review 'could amount to no more than an advisory opinion,' and the Court must decline jurisdiction." Robert L. Stern, *Supreme Court Practice* 209-10 (8th ed. 2002) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)). No adequate and independent state ground supports the judgment here because, were this Court to reverse the Court of Appeal's holding with respect to the CDA, the Court of Appeal's analysis regarding the application of state law would be fundamentally altered upon remand.

The Court of Appeal applied various factors to determine whether Agilent owed a duty to Delfino and Day to have acted to stop Moore from continuing to send threats to them from Agilent's network once the FBI advised Agilent that Moore was engaged in such behavior. Pet. App. 35-37 (citing *Rowland v. Christian*, 443 P.2d 561, 564-65 (Cal. 1968)). Many of these factors (e.g., Agilent's moral blame for its inaction here and the policy of preventing future harm like what Moore did to Delfino and Day) (*see* Pet. App. 35) would be viewed differently by the Court of Appeal on remand if Delfino and Day's interpretation of the CDA is correct.

For example, if this Court holds that the CDA reflects a federal policy that strongly encourages companies like Agilent to ensure that their computer networks are not misused for tortious purposes, then the fact that Agilent did nothing after being informed of the abuse would suggest that strong moral blame should be attributed to Agilent's conduct, rather than no moral blame as the

Court of Appeal found. Similarly, if federal policy under the CDA is to encourage companies to prevent harassing uses of their computer networks, then there would be a strong policy in favor of preventing future harm similar to that which occurred here. By contrast, the Court of Appeal below rejected such a policy goal because it might cause greater employer oversight of employees' use of the Internet. Pet. App. 35. Such a view would likely be altered by this Court's clarification of the meaning and purpose of the CDA.

Similarly, the Court of Appeal's finding that there was no evidence Agilent breached any duty of care or could have done anything to stop future threats (*see* Pet. App. 37-38) assumes the lack of any obligation of Agilent to have investigated once the FBI advised Agilent that it believed Moore had made threats from Agilent's computers – a finding that would be altered if this Court were to adopt a different interpretation of the CDA than that adopted by the Court of Appeal.

Thus, were this Court to reverse the Court of Appeal's opinion with respect to the CDA, the Court of Appeal's analysis regarding whether there was sufficient evidence of a state law tort would be materially changed. Accordingly, there is no independent and adequate state law ground to bar review here.

CONCLUSION

For the above reasons, this court should grant the petition for a writ of certiorari.

Respectfully submitted,

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145 Cal.App.4th 790

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAELANGELO DELFINO, et al., Plaintiffs and Appellants, v. AGILENT TECHNOLOGIES, INC., Defendant and Respondent.	H028993 (Santa Clara County Super.Ct.No. 1-03-CV-001573) (Filed Dec. 14, 2006)

A series of anonymous messages were sent over the Internet that constituted threats to Michelangelo Delfino and Mary E. Day (collectively, plaintiffs). The messages consisted of electronic mail messages (e-mails) sent to Delfino and messages that were posted on Internet bulletin boards. These e-mails and postings were ultimately traced to Cameron Moore. Plaintiffs brought suit against Moore and his former employer, Agilent Technologies, Inc. (Agilent). Agilent moved for summary judgment on various grounds, and the trial court granted the motion on the basis that Agilent was immune from suit under the Communications Decency Act of 1996 (CDA). Specifically, the court held that under title 47 of the United States Code section 230(c)(1),[1] Agilent was a "provider . . . of an interactive computer service" entitled to immunity under the CDA.

[1] Hereinafter, all undesignated statutory references are to title 47 of the United States Code.

Plaintiffs contend on appeal that summary judgment should not have been granted because Agilent was not immune from suit under the CDA. They argue that they made a prima facie showing of negligence. We conclude after a de novo review that Agilent was an interactive computer service provider; as such, it was immune from liability for alleged damages arising out of the cyber-threats transmitted by its employee, Moore. We hold further that plaintiffs did not make a prima facie showing to support a claim against Agilent under theories of ratification, respondeat superior, or negligent supervision/ retention. We therefore find that summary judgment in favor of Agilent was proper and will affirm.

PROCEDURAL HISTORY[2]

The complaint was filed on July 22, 2003.[3] It included a claim for intentional infliction of emotional distress and a purported claim for negligent infliction of emotional distress against Moore and Agilent.[4] Plaintiffs claimed

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[2] To avoid repetition, we present in detail the substance of Agilent's motion for summary judgment and plaintiffs' opposition thereto in part III, sections A and B, of the Discussion, *post.*

[3] Plaintiffs have represented themselves in propria persona in this litigation.

[4] Because of their lengthy titles, for convenience we refer to the two purported causes of action in the complaint as the "intentional infliction" and "negligent infliction" claims, respectively. In so doing, we acknowledge both that a purported claim for negligent infliction is in actuality not a tort separate and apart from the tort of negligence (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984), and that courts sometimes choose the acronyms "IIED" and "NIED" to refer to these torts. (See, e.g., *Wooden v. Raveling* (1998) 61 Cal.App.4th 1035; see also *Lawson v. Management Activities, Inc.* (1999) 69 Cal.App.4th 652, 656 [noting that use of acronym for

(Continued on following page)

that Moore sent a number of anonymous threats over the Internet and that he used Agilent's computer system to send these threats. Plaintiffs alleged further that Agilent was aware that Moore was using its computer system to threaten plaintiffs and that it took no action to prevent its employee from continuing to make his threats over the Internet.

Plaintiffs alleged that the anonymous threats against them occurred between April and July 2002, while an appeal was pending in unrelated litigation brought by plaintiffs' former employer, Varian Medical Systems (and others), against plaintiffs.[5] The threats alleged in the complaint – most of which were directed solely at Delfino – were either e-mail messages sent to Delfino or were messages posted on the Yahoo! Message Board VAR.[6] Most

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negligent infliction of emotional distress gives "more credence [to the allegation] than it deserves"].)

[5] The unrelated lawsuit included claims for defamation that arose out of numerous derogatory messages about Varian and certain Varian employees that Delfino and Day posted on Internet message boards. Judgment on a jury verdict adverse to Delfino and Day (i.e., an award of $425,000 in compensatory damages plus punitive damages of $350,000) was entered in that case. Ultimately, the California Supreme Court reversed on the ground that the previous appeal of Delfino and Day from the trial court's order denying their special motions to strike under Code of Civil Procedure section 425.16, subdivision (b)(1) (i.e., their motions to strike the Varian complaint as a "SLAPP" [strategic lawsuit against public participation]) operated as a stay on all further trial court proceedings; accordingly, the Supreme Court determined that the judgment was void. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180.)

[6] It is unnecessary for us to repeat each of the odious e-mail messages and postings attributed to Moore. One posting (by "crack_smoking_jesus") on July 18 read: " 'I arranged for you to have a visitor. Have they [*sic*] been there yet? If not, then they will visit soon. Don't say I didn't warn you. Criminal matters are handled less carefully than

(Continued on following page)

of the threatening e-mails and postings were sent by an individual using the Yahoo screen name "crack_smoking_jesus"; Moore later admitted to the Federal Bureau of Investigation (FBI) that he had used this pseudonym.[7]

The first cause of action of the complaint, captioned "Intentional Infliction of Emotional Distress," alleged that Moore's conduct in sending the anonymous e-mails and postings was intentional and malicious, causing plaintiffs to "suffer humiliation, mental anguish, and emotional and physical distress." Plaintiffs alleged on information and belief that Agilent "was informed and knew that Moore was using its computer system to" send the threatening messages. The second cause of action, captioned, "Negligent Infliction of Emotional Distress," contained (and incorporated by reference) the allegations of the first cause of action.

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civil matters.' " And plaintiffs alleged in the complaint that on July 30, the following e-mail was sent to Delfino (from "dr_dweezil@yahoo.com"): " 'It's coming [expletive], and you won't see it. I seriously hope you have health insurance because you're going to get your ass stomped by me and some friends. The best part will be you won't be able to prove it was me. I already have proof I was somewhere else. You can look forward to all your fingers getting broken, several kicks to the ribs and mouth, break some teeth, and a cracked head. Also, your car will be trashed and your computer destroyed. Maybe set your place on fire so you can be evicted. If your [expletive] is there, she'll take a little ride to the parts of San Jose where they don't speak [E]nglish . . . Die, [expletive]. You'll wish you had.' "

[7] The attorneys who represented Delfino and Day in the unrelated Varian litigation wrote a law review article about the threatening e-mails and their attempts to trace their origin. (See Eisenberg & Rosen, *Unmasking "crack_smoking_jesus": Do Internet Service Providers Have a Tarasoff Duty to Divulge the Identity of a Subscriber Who Is Making Death Threats?* (2003) 25 Hastings Comm. & Ent. L.J. 683.)

Agilent filed a motion for summary judgment, or, in the alternative, for summary adjudication. Plaintiffs opposed the motion. On March 18, 2005, the court entered an order granting Agilent's motion for summary judgment, concluding that "Agilent established that it is immune from liability under [title] 47 [of the United States Code section] 230(c)(1) . . . , and plaintiffs failed to raise a triable issue of material fact in regard thereto." Judgment was entered on the summary judgment order on May 13, 2005.[8] Plaintiffs filed a timely notice of appeal from the judgment. The appeal is one that properly lies from a judgment entered upon an order granting summary judgment. (Code Civ. Proc., § 437c, subd. (m); *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 628-629.)

DISCUSSION

I. *Issues On Appeal*

Plaintiffs contend that the court erred in granting the summary judgment motion. They assert that Agilent is not immune from suit under section 230 of the CDA. They argue that because Agilent had no CDA immunity and it failed to take measures to protect plaintiffs from Moore's threatening communications, it is subject to negligence liability.

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[8] A separate judgment that is not a subject of the instant appeal was entered on April 19, 2005, in favor of plaintiffs against Moore after a court trial. The judgment consisted of an award of $87,323 in damages collectively to plaintiffs, plus $200,000 (general damages) and $300,000 (punitive damages) awarded to each of the plaintiffs. Although not a default proceeding, Moore did not participate at the trial either personally or through counsel.

II. *Standard of Review*

As we have acknowledged, "[c]onstruction and application of a statute involve questions of law, which require independent review." (*Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 711; see also *Elene H. v. County of Los Angeles* (1990) 220 Cal.App.3d 1445, 1451 [de novo review of summary judgment motion founded on defense of immunity].) Likewise, since summary judgment motions involve purely questions of law, we review the granting of summary judgment de novo. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139 [de novo review of "whether a triable issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law"]; *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

III. *The Order Granting Summary Judgment*

A. *Agilent's Motion*

On July 26, 2002,[9] Agilent was contacted by Special Agent Sean Wells from the FBI, who "was requesting information on the user whose originating IP address came back to Agilent for 'dreamcaster.txt.'" Special Agent Wells gave no other information concerning the inquiry during the initial contact. But he followed up with an e-mail to Agilent on July 26, in which he provided a listing of log-in entries for "dreamcaster.txt" where Agilent was the originating IP address; the listing included 25 log-in entries dated between July 12 and July 15. The internal investigation was handled primarily by Agilent's IT

[9] All dates are 2002 unless otherwise stated.

Security Consultant and Program Manager for CITSIRT (Corporate Information Technology Security Incident Response Team), Bill Rolfe, and its EHS & Security Manager, Douglas Buffington.

On July 29, Buffington telephoned Special Agent Wells to introduce himself and to indicate that Agilent would cooperate fully with the FBI. Special Agent Wells stated that he "was investigating some e[-]mail traffic, some of which the FBI suspected might [have been] sent by an Agilent employee." Buffington asked for details but was told that Special Agent Wells had obtained information through a grand jury proceeding and could not discuss any specifics.

On July 30, Rolfe traced "dreamcaster.txt" to the Agilent computer assigned to Moore. Rolfe performed further tests which confirmed that Moore was the current user of the machine. After completing this work, Rolfe e-mailed Buffington on July 30 with the results.

Buffington telephoned Special Agent Wells on July 30 and advised that Agilent had identified the user of the IP address. Before Buffington could identify the person, Special Agent Wells asked, "'Is the name that you have Cameron Moore?'" Buffington confirmed that this was the case. Special Agent Wells advised Buffington further that (1) "he was investigating complaints by Michelangelo Delfino and Mary Day, who were involved in a lawsuit with their former employer, Varian"; (2) plaintiffs had posted and were continuing "to post tens of thousands of inflammatory messages about Varian executives";[10] (3)

[10] Delfino testified in deposition that since 1997, he and Day had made over 28,000 Internet postings concerning Varian or Moore.

after plaintiffs had lost in a jury trial involving Varian, some supporters of Varian began responding negatively to plaintiffs; (4) plaintiffs had learned that Moore had made Internet postings siding with Varian; (5) plaintiffs had made a series of Internet postings about Moore; (6) plaintiffs "had received some potentially threatening e[-]mails that appeared to come from Moore"; (7) "the situation had 'gotten out of hand' and the FBI wanted 'to put an end to it' "; (8) "the FBI wasn't planning to arrest Moore, didn't consider him to be dangerous, and wasn't after Moore's job"; and (9) the FBI simply wanted to speak to him to "get the situation stopped." Special Agent Wells neither informed Buffington of the substance of any of the e-mails the FBI was investigating, nor advised him that Moore made any threatening postings on Internet bulletin boards. Buffington did not understand from his communications with Special Agent Wells that the e-mails being investigated had been sent by Moore by using Agilent systems to log on to the Internet from work.

On August 1, Special Agent Wells made a follow-up request to Buffington for Agilent to investigate the log-in history (between June 27 and July 10) to determine whether the alias "dr_dweezil2000.txt" also belonged to Moore. Agilent thereafter determined that this alias was also traceable to the Agilent computer assigned to Moore. Buffington informed Special Agent Wells of Agilent's findings.

On August 12, Buffington and Agilent's Management Support Consultant, Stephanie Pierce,[11] met with Moore

[11] After leaving Agilent in or about May 2003, Stephanie Pierce married and thereafter used Moser as her last name. For clarity and convenience, we refer to the witness by her former surname.

"to obtain Moore's side of the story and to administer a stern warning." Buffington declared that after Pierce explained what Agilent knew, Moore apologized for involving Agilent "but *denied* sending any threats through the use of Agilent systems." (Original underscore.) He stated that he had promised in writing that he would not engage in any further similar conduct and thereafter provided Agilent with a copy of his letter to the United States Attorney.[12] Pierce gave Moore a stern warning; although she indicated that "there was no proof that he had sent threatening e[-]mails over the Internet through the use of Agilent systems, she reminded Moore of Agilent's Standards of Business Conduct [13] and warned him that . . . he should not be using Agilent's computer systems for anything relating to [plaintiffs] or any other personal issues."

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[12] In his lengthy letter to the United States Attorney, Moore admitted guilt, expressed his remorse for the cyberthreats, and presented a detailed account to support his assertion that his actions had been provoked by Delfino's own Internet activity. The letter contained no description of the method by which Moore had sent the threatening e-mails and postings, did not indicate that Agilent's computer systems were in any way implicated, and mentioned Agilent only in the following contexts: (1) that Moore was fearful that his actions would result in the loss of his Agilent job; and (2) that some of Delfino's alleged provocative acts involved postings using Moore's name on "Agilent stock message boards [stating] some negative and crude things about [Agilent]."

[13] Agilent's Standards of Business Conduct, under the heading "*May I use Agilent computers . . . for personal messages, personal access to the Internet or other personal use?*" read in part: "[C]ertain messages and materials simply must not be sent or accessed on Agilent equipment or through Agilent systems; these include . . . threatening, sexually explicit or harassing materials. You must not use Agilent resources to create, transmit, store or display messages, images or materials in any of these categories. Misuse of Agilent assets is misconduct and may result in termination of your employment."

In February 2003, Special Agent Wells contacted Buffington to advise him that the FBI planned to arrest Moore for conduct relating to Delfino. Buffington specifically asked if the planned arrest involved conduct by Moore in using Agilent computers, and Special Agent Wells said that it did not involve such conduct. In or about mid-February 2003, the FBI arrested Moore. In late February 2003, Buffington contacted the FBI to request a copy of the affidavit signed by Special Agent Wells pertaining to Moore's arrest (arrest affidavit). Although Buffington was told at the time that the FBI "would be faxing it," he did not receive the faxed copy of the arrest affidavit until April 7, 2003. That arrest affidavit contained a number of details about the substance of Moore's threatening e-mails and postings, none of which had been provided previously by the FBI to Agilent.

On April 22, 2003, Buffington and two other Agilent representatives met with Moore. Moore admitted to Agilent for the first time that "*prior to* August 2002, he had sent some things that 'weren't nice and could be interpreted as threats' by logging onto the Internet while at work." (Original underscore.) This statement directly contradicted what Moore had told Buffington and Pierce on August 12. Moore denied that he had used Agilent's systems to send any threats after August. He also admitted that he had "sent sexually explicit or offensive e[-]mails over the Agilent e[-]mail system." Moore was informed at the conclusion of the meeting that he "was being placed on immediate administrative leave while Agilent determined what discipline was appropriate."

On April 30, 2003, Agilent terminated Moore's employment. The termination notice advised Moore that he was being involuntarily terminated because he had

violated Agilent's Standards of Business Conduct, "specifically misuse of Agilent's assets."[14]

B. *Opposition to Summary Judgment Motion*

The evidence presented in opposition to the summary judgment motion primarily consisted of excerpts from transcripts of the depositions of plaintiffs and several Agilent employees, the arrest affidavit, and documents concerning Moore's sentencing. While that evidence was voluminous, most of it was not germane to the issues of CDA immunity and negligence liability.

Further, while plaintiffs indicated that there was a genuine dispute concerning a number of issues of material fact that Agilent claimed to have been undisputed (UMF), the evidence plaintiffs cited, upon examination, did not support their assertions. For instance, plaintiffs claimed a dispute existed regarding UMF number 7 – i.e., that on July 30, the FBI neither told Agilent that threats had been sent through Agilent's computer system nor provided it with the contents of any e-mail the FBI was investigating. But plaintiffs' cited evidence consisted of improperly spliced, separate excerpts of Buffington's declaration and the arrest affidavit. As a result of the improper splicing, plaintiffs created purported content that did not exist in either document. (Indeed, the two spliced excerpts of the arrest affidavit were separated by three pages of text.) In

[14] Moore ultimately pleaded guilty in September 2003 to one count of violating section 1512(d)(4) of title 18 of the United States Code (intentional harassment to dissuade another from assisting in a criminal prosecution). (The offense of which Moore was convicted did not involve the use of Agilent's computer system.) He was placed on probation for a period of four years.

any event, the purported evidence plaintiffs cited did not demonstrate that UMF number 7 was disputed.[15]

Other matters raised in plaintiffs' opposition to the summary judgment motion relevant to this appeal are discussed, *post.*

C. *Immunity Under the CDA*

1. *Applicable law*

Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The statute goes on to provide that causes of action inconsistent with it under state law are precluded: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. *No cause of action*

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[15] There are a number of other instances in which plaintiffs claimed in their response to Agilent's separate statement that material facts were disputed when, in reality, no evidence demonstrating such dispute was cited. These undisputed material facts included the following: (a) the FBI assured Agilent on July 30 that Moore was a threat to no one, that no arrest was planned, and that Agilent need not be concerned about him (UMF no. 6); (b) Agilent's early August internal investigation did not disclose that Moore had used its computer system to send any threatening e-mails or postings (UMF no. 11); (c) when Agilent reprimanded Moore on August 12, he did not admit to using its computer system to make any threatening Internet postings and denied using Agilent's system to send any e-mail threats (UMF no. 13); (d) no Agilent employee knew about, assisted with, participated in, or had any involvement with Moore's cyberthreats (UMF no. 16); (e) Agilent's second internal investigation conducted after Moore's February 2003 arrest did not disclose that Moore had made any cyberthreats (UMF no. 18); and (f) Agilent did not learn the substance of Moore's threatening e-mails and postings until it received the arrest affidavit on April 7, 2003 (UMF no. 19).

may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (§ 230(e)(3), italics added.)

Agilent contends that CDA immunity applied to plaintiffs' claims here. It argues that plaintiffs sought to impose derivative liability upon Agilent for Moore's Internet communications, where Agilent was simply a provider of an interactive computer service. Plaintiffs naturally dispute this contention.

The CDA – of which section 230 is a part – was enacted in 1996.[16] Its "primary goal . . . was to control the exposure of minors to indecent material" over the Internet. (*Batzel v. Smith, supra,* 333 F.3d at p. 1026.) Thus, an "important purpose of [the CDA] was to encourage [Internet] service providers to self-regulate the dissemination of offensive materials over their services." (*Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, 331, cert. den. (1998) 524 U.S. 937 (*Zeran*); see § 230, subd. (b)(4): "It is the policy of the United States – [¶] . . . [¶] (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.") Thus, section 230(c)(2) immunizes from liability an interactive computer service provider or user who makes good faith efforts to restrict

[16] Since the passage of the CDA in 1996, "[p]arts of [it] have . . . been struck down as unconstitutional limitations on free speech, see *Reno v. ACLU,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) [concerning constitutionality of portions of section 223]; *United States v. Playboy Ent. Group,* 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) [concerning constitutionality of section 561], but the section at issue here, [section] 230, remains intact." (*Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1026, cert. den. (2004) 541 U.S. 1085.)

access to material deemed objectionable.[17] A second objective of the CDA was to avoid the chilling effect upon Internet free speech that would be occasioned by the imposition of tort liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery. (*Zeran, supra,* at pp. 330-331; see also § 230(b): "It is the policy of the United States – [¶] (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [¶] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. . . .")

Zeran, supra, 129 F.3d 327, is the leading case addressing the issue of immunity granted under section 230 to interactive computer service providers.[18] There, the

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[17] "No provider or user of an interactive computer service shall be held liable on account of – [¶] (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or [¶] (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph [(A)]." (§ 230(c)(2), fn. omitted.) The end of the actual text of the statute refers to "paragraph (1)." But it is apparent that the reference should be to "paragraph (A)." (See § 230(c)(2), fn. 1.)

[18] Plaintiffs refer repeatedly to a decision critical of *Zeran* by the First District Court of Appeal (Division Two) for which review was subsequently granted by the Supreme Court. (See *Barrett v. Rosenthal* (2004) 114 Cal.App.4th 1379, review granted Apr. 14, 2004, S122953.) Such grant of review by the Supreme Court of course "had the effect of depublishing" the Court of Appeal's decision. (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1067, fn. 6.) Moreover, after oral argument and submission of this case, the Supreme Court, following *Zeran,* reversed the First District Court of Appeal and held that section

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plaintiff (Kenneth Zeran) alleged that America Online, Inc. (AOL) "unreasonably delayed in removing defamatory messages posted by an unidentified third party [on the AOL bulletin board[19]], refused to post retractions of those messages, and failed to screen for similar postings thereafter." (*Id.* at p. 328.) The anonymous defamatory messages involved the advertising for purported sale of shirts containing "offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City." (*Id.* at p. 329.) The postings included instructions "to call 'Ken,'" and listed the plaintiff's home telephone number. (*Ibid.*) There was no dispute that AOL was an "'interactive computer service,'"[20] and that the person responsible for the anonymous postings

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230 provides broad immunity from defamation liability for a provider or user of an interactive computer service. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33.)

[19] An Internet bulletin board is "a computerized version of a cork and pin board on which users can post, read, and respond to messages." (Weber, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech* (1995) 46 Case Western Reserve L.Rev. 235, 238, fns. omitted.) After logging in to an Internet bulletin board, a person may post messages, respond to messages already posted, or simply read the discussions without posting any messages. (*Id.* at p. 239.) Most Internet bulletin boards permit participants to use pseudonyms. (*Id.* at p. 241.)

[20] Section 230(f)(2) – which, at the time *Zeran* was decided was codified under section 230(e)(2) – provides: "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

was an "'information content provider,'"[21] as those terms were defined under the CDA. (*Id.* at p. 330, fn. 2.)

The Fourth Circuit concluded that the CDA provided AOL (as an interactive computer service provider) with immunity from the plaintiff's claims. It reasoned that the CDA's immunity provisions were the result of Congressional recognition of "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium" (*Zeran*, *supra*, 129 F.3d at p. 330), and Congress's desire "to encourage service providers to self-regulate the dissemination of offensive material over their services." (*Id.* at p. 331.) The court held that section 230(c)(1) conferred "broad immunity" (*Zeran*, *supra*, at p. 331) applicable to all interactive computer service providers, irrespective of whether they were publishers or distributors of the alleged defamatory matter authored by the information content provider. (*Id.* at pp. 331-334.)

At least three other federal circuit courts have followed the Fourth Circuit's decision in *Zeran, supra,* 129 F.3d 327. (See *Carafano v. Metrosplash.com., Inc.* (9th Cir. 2003) 339 F.3d 1119; *Batzel v. Smith, supra,* 333 F.3d 1018; *Green v. America Online* (3d Cir. 2003) 318 F.3d 465; *Ben Ezra, Weinstein, & Co. v. America Online Inc.* (10th Cir. 2000) 206 F.3d 980.)[22] In addition, two district courts of

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[21] Section 230(f)(3) – which, at the time *Zeran* was decided was codified under section 230(e)(3) – provides: "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

[22] The Seventh Circuit Court of Appeals has acknowledged that there is no appellate decision contrary to *Zeran's* holding that section 230(c)(1) affords immunity to web hosts and other Internet service

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appeal in California have followed *Zeran*. (See *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816 [Fourth District, Division One]; *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684 [First District, Division Four].) Moreover, the California Supreme Court has very recently held that *Zeran* properly construed section 230(c)(1) as affording broad immunity to any provider or user of an interactive computer service, irrespective of whether that provider or user may have been viewed under traditional defamation law as a "publisher" or "distributor" (i.e., "secondary publisher") of the allegedly defamatory statement. (*Barrett v. Rosenthal, supra,* 40 Cal.4th at pp. 57-58.)

2. *Whether Agilent is immune from suit under the CDA*

There are three essential elements that a defendant must establish in order to claim section 230 immunity. They are "(1) the defendant [is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider." (*Gentry v. eBay, Inc., supra,* 99 Cal.App.4th at p. 830.) We evaluate Agilent's contention that it is immune under the CDA by utilizing this three-factor test.

First: Was Agilent "a provider or user of an interactive computer service?" (*Gentry v. eBay, Inc., supra,* 99

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providers for state-law claims based upon offensive material created by others and published over the Internet. (*Doe v. GTE Corp.* (7th Cir. 2003) 347 F.3d 655, 659-660.) The *Doe* court, however, recognized that there was a theoretical debate on the issue and concluded that it did not need to decide the question. (*Id.* at pp. 660-661.)

Cal.App.4th at p. 830.) Courts have noted that the CDA has interpreted the term "interactive computer service" broadly. (See, e.g., *Batzel v. Smith, supra,* 333 F.3d at p. 1030, fn. 15 [term "includes a wide range of cyberspace services, not only [I]nternet service providers"]; *Optinreal-big.com, LLC v. Ironport Systems, Inc.* (N.D.Cal. 2004) 323 F.Supp.2d 1037, 1044 [term is "broadly defined" under the statute].) Thus, there are a number of examples of the expansive application of "interactive computer service" in determining CDA immunity. (See, e.g., *Gentry v. eBay, Inc., supra,* at p. 831 [online auction Web site]; *Kathleen R. v. City of Livermore, supra,* 87 Cal.App.4th at p. 692 [library providing Internet access to public by use of computers]; *Carafano v. Metrosplash.com., Inc., supra,* 339 F.3d at p. 1124 [online dating Web site]; *Batzel v. Smith, supra,* at p. 1021 [nonprofit Web site operator]; *Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.* (N.D.Ill., Nov. 14, 2006, No. 06 C 0657) ___ F.Supp.2d ___ [2006 WL 3307439] [operator of Internet bulletin board carrying notices of jobs, housing services, and goods for sale]; *Parker v. Google, Inc.* (E.D.Pa. 2006) 422 F.Supp.2d 492, 501 [Internet search engine operator]; *PatentWizard, Inc. v. Kinko's, Inc.* (D.S.D. 2001) 163 F.Supp.2d 1069, 1071 [company providing Internet access to customers through computer rental]; *Schneider v. Amazon.com, Inc.* (2001) 108 Wash.App. 454, 31 P.3d 37, 40-41 [online bookstore Web site].)

We are aware of no case that has held that a corporate employer is a provider of interactive computer services under circumstances such as those presented here. But several commentators have opined that an employer that provides its employees with Internet access through the company's internal computer system is among the class of

parties potentially immune under the CDA. (See, e.g., Zion, *Protecting the E-Marketplace of Ideas by Protecting Employers: Immunity for Employers Under Section 230 of the Communications Decency Act* (2002) 54 Fed. Comm. L.J. 493, 496 ["it is evident from the language and legislative history of the [CDA] that Congress intended employers to be covered under § 230," (fn. omitted)]; Garvey, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology* (1999) 25 U. Dayton L.Rev. 133, 139 ["corporations with direct Internet connections are indeed [Internet service providers] and, therefore, should receive [CDA] immunity from employee computer abuse" (fn. omitted)].) Certainly, it is beyond question today – certainly more so than 10 years ago – that "Internet resources and access are sufficiently important to many corporations and other employers that those employers link their office computer networks to the Internet and provide employees with direct or modem access to the office network (and thus to the Internet)." (*American Civil Liberties Union v. Reno* (E.D.Pa.1996) 929 F.Supp. 824, 832-833, affd. *sub. nom. Reno v. American Civil Liberties Union* (1997) 521 U.S. 844.) And Agilent clearly meets the definition of that term under section 230(f)(2) (see fn. 20, *ante*), in that it "provides or enables computer access by multiple users [i.e., Agilent's employees] to a computer server." As noted in Rolfe's declaration, Agilent's proxy servers are the primary means by which thousands of its employees in the United States access the Internet. In light of the term's broad definition under the CDA, we conclude that Agilent was a provider of interactive computer services. (See, e.g., *Kathleen R. v. City of Livermore, supra,* 87 Cal.App.4th at pp. 692-693 [rejecting contention that library was not immune because of its governmental entity status]; *Donato v. Moldow* (2005) 374 N.J.Super.

475, 486-488, 865 A.2d 711, 718 [Web site's noncommercial status and limited use irrelevant to CDA immunity analysis].)

Second: Does "the cause of action treat the defendant [Agilent] as a publisher or speaker of information?" (*Gentry v. eBay, Inc., supra,* 99 Cal.App.4th at p. 830.) On information and belief, plaintiffs alleged that Agilent knew (1) Moore was sending threatening messages, and (2) that he was using Agilent's computer system to send them. Agilent rebutted this allegation in its summary judgment motion, and plaintiffs presented no evidence in opposition that Agilent had such knowledge. This failing notwithstanding, it is apparent that plaintiffs, in alleging that Moore's employer was liable for his cyberthreats, sought to treat Agilent "as a publisher or speaker" of those messages. (§ 230(c)(1).)

We address whether section 230 immunity may apply to the specific tort claims alleged here. While many of the cases addressing CDA immunity have involved claims for defamation (see, e.g., *Batzel v. Smith, supra,* 333 F.3d 1018; *Ben Ezra, Weinstein, & Co. v. America Online Inc., supra,* 206 F.3d 980; *PatentWizard, Inc. v. Kinko's, Inc., supra,* 163 F.Supp.2d 1069; *Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44), it is clear that immunity under section 230 is not so limited. The Fourth Circuit noted that "[t]he imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech." (*Zeran, supra,* 129 F.3d at p. 330.) Thus, CDA immunity has been applied to defendants asserting that they were interactive computer service providers or users for a variety of tort claims other than defamation. (See, e.g., *Kathleen R. v. City of Livermore,*

supra, 87 Cal.App.4th 684 [claims included nuisance and premises liability]; *Carafano v. Metrosplash.com., Inc., supra,* 339 F.3d 1119 [claims included invasion of privacy, misappropriation of right of publicity, and negligence]; *Doe v. America Online, Inc.* (Fla. 2001) 783 So.2d 1010 [negligent failure to control third party's illegal postings].) And several cases applying section 230 immunity have involved the specific claim alleged in plaintiffs' complaint here, namely, an intentional infliction claim. (See *Prickett v. InfoUSA* (E.D.Tex. 2006) 2006 WL 887431; *Donato v. Moldow, supra*, 865 A.2d 711.)

In *Kathleen R. v. City of Livermore, supra,* 87 Cal.App.4th 684, the First District Court of Appeal (Division Four) held that section 230(c)(1) afforded the City of Livermore immunity from a broad array of claims arising out of a public library providing access to the Internet through use of its computers, including a taxpayer action for waste of public funds (Code Civ. Proc., § 526a), and a claim for violation of substantive due process (42 U.S.C. § 1983). In applying CDA immunity to the taxpayer claim, the court specifically rejected the plaintiff's contention that the defense was limited to tort claims for damages and did not apply to taxpayer actions and suits for declaratory and injunctive relief. (*Kathleen R. v. City of Livermore, supra,* at pp. 697-698; see also *Schneider v. Amazon.com, Inc., supra,* 31 P.3d at 42 ["courts that have considered the question have held § 230 provides immunity to civil claims generally"].) We conclude, therefore, that the claims against Agilent treated it "as a publisher or speaker" (§ 230(c)(1)) of Moore's messages and that plaintiffs' claims were among those to which immunity under the CDA potentially applies.

Third: Was "the information at issue . . . provided by another information content provider?" (*Gentry v. eBay, Inc., supra,* 99 Cal.App.4th at p. 830.)[23] Clearly, Moore was the party who authored the offensive e-mails and postings. The allegations of the complaint do not suggest otherwise; to the contrary, the complaint consistently and repeatedly attributes authorship of the offensive messages to Moore alone. (See, e.g., paragraphs 1, 5, 6, 22, 23, 25 through 28, 30 through 32, 39, 40, 47, and 48 of the complaint.) And there was no evidence that Agilent played any role whatsoever in "the creation or development" of the messages. (§ 230(f)(3); see fn. 21, *ante.*)[24] Clearly, Agilent satisfied the third standard enunciated in *Gentry v. eBay, Inc., supra,* 99 Cal.App.4th at page 830, required for a finding of CDA immunity.

Therefore, the trial court correctly held that Agilent was entitled to CDA immunity, because "(1) [Agilent was]

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[23] Under the CDA, it is of course possible to be both an interactive computer service provider *and* "an information content provider; the categories are not mutually exclusive." (*Gentry v. eBay, Inc., supra,* 99 Cal.App.4th at p. 833, fn. 11.)

[24] Moreover, even had Agilent played some minor role in the formulation of Moore's messages – a matter unsupported by the evidence here – such conduct would not transform it to the status of an information content provider to defeat CDA immunity. (See *Carafano v. Metrosplash.com., Inc., supra,* 339 F.3d at p. 1124 [interactive dating service not information content provider despite supplying questionnaire used by third party to provide information]; *Ben Ezra, Weinstein, & Co. v. America Online Inc., supra,* 206 F.3d at 985 [AOL, as interactive computer service provider that published allegedly inaccurate stock information created by third party, immune under CDA, notwithstanding AOL advised information content providers on other occasions of inaccuracy of stock information]; *Barrett v. Rosenthal, supra,* 40 Cal.4th at p. 60, fn. 19 ["many courts have reasoned that participation going no further than the traditional editorial functions of a publisher cannot deprive a defendant of *section 230* immunity"].)

. . . a provider or user of an interactive computer service; (2) the cause of action treat[ed Agilent] as a publisher or speaker of information; and (3) the information at issue [was] provided by another information content provider [Moore]." (*Gentry v. eBay, Inc., supra,* 99 Cal.App.4th at p. 830.) Accordingly, summary judgment was properly granted. (See generally *Salazar v. Upland Police Dept.* (2004) 116 Cal.App.4th 934, 938 [summary judgment appropriate where the defendant establishes immunity defense].)[25]

D. *Intentional Infliction Claim*

We have concluded, *ante,* that summary judgment was properly granted because Agilent was entitled to CDA immunity. But even if plaintiffs' claims were not barred under section 230(c)(1), the granting of Agilent's summary

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[25] We recognize that there is an existing debate concerning whether immunity under the CDA applies equally to both publishers and distributors of information authored by third parties and disseminated over the Internet. (See, e.g., *Doe v. America Online, Inc., supra,* 783 So.2d at pp. 1018-1028 (dis. opn. of Lewis, J.); Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation* (2001) 14 Harv. J.L. & Tech. 569, 637-642; Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet* (1997) 61 Alb. L.Rev. 147, 167-172.) Our Supreme Court has recently held that a party who distributes a defamatory statement made by a third party over the Internet – even if he or she knows or should know of the statement's defamatory character – enjoys the same CDA immunity from suit as an initial publisher of such a statement. (*Barrett v. Rosenthal, supra,* 40 Cal.4th at pp. 57-58.) Thus, under *Barrett* – although Agilent did not act as a distributor of Moore's offensive e-mails and postings, and *at most* merely provided the means of communicating the messages by Moore's use of his employer's computer to access the Internet to send the messages – CDA immunity applies in this instance irrespective of whether Agilent is deemed to have been a publisher or distributor.

judgment motion was nonetheless proper, because plaintiffs failed to make a prima facie showing on their intentional infliction claim against Agilent.

1. *Nature of intentional infliction claim*

To establish an intentional infliction claim, the plaintiff must show "'"(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct."'" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. [Citations.]" (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.)

It is established that "[o]rdinarily mere insulting language, without more, does not constitute outrageous conduct." (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 155, fn. 7.) Liability based upon an intentional infliction claim "'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' (Rest.2d Torts, § 46, com. d.)" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1122, overruled on another ground in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854, fn. 19; see also *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 617.) But under the circumstances here, Moore's repeated threats of physical harm directed to plaintiffs, stated in graphic terms, were sufficient acts of extreme and outrageous conduct with intent to cause emotional distress. (See, e.g.,

KOVR-TV, Inc. v. Superior Court (1995) 31 Cal.App.4th 1023, 1028-1031 [news reporter's interview of preteen children, including advising them of murder of children's two playmates by playmates' mother and her subsequent suicide, sufficient for finding of outrageous conduct to defeat summary judgment]; *Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 229-230 [threats of personal harm, death, and harm to family if the plaintiff did not sign union agreement constituted outrageous conduct]; but see *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494-499 [single telephone message referring to recent sensational airline crash that the plaintiffs interpreted as death threat not outrageous conduct].) Indeed, our Supreme Court has recognized, as a theoretical proposition, that an injurious e-mail communication may give rise to an intentional infliction claim. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1347.)

But Moore, not Agilent, was indisputably the party who made the threats. Therefore, while it may have been established that *Moore* committed extreme and outrageous acts directed to plaintiffs with the intent to cause emotional distress, there is a significant leap that must occur to establish a prima facie case for an intentional infliction claim *against Agilent*.[26] While plaintiffs' pleading

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[26] Citing *Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 56, Agilent argues on appeal that plaintiffs' intentional and negligent infliction claims should be treated as defamation claims. But *Hustler Magazine* is distinguishable and does not support Agilent's assertion here. There, Jerry Falwell sought to recover damages for the publication of an advertisement parody (specifically labeled as such) under theories of invasion of privacy, libel, and intentional infliction. (*Id.* at pp. 47-48.) The jury found against Falwell on the libel claim, but awarded compensatory and punitive damages on Falwell's intentional infliction claim. (*Id.* at p. 49.) The Supreme Court concluded that the

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is somewhat uncertain,[27] it appears that their contentions are that Agilent should be held liable for Moore's threatening messages (1) because it ratified its employee's actions, (2) under respondeat superior principles, or (3) because Agilent was negligent in its supervision and retention of Moore as its employee. (See *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 947, disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4 [affirming intentional infliction liability of employer for willful acts (utterance of racial epithets and false statements about the plaintiff's job knowledge) of employer's managers]; *Fisher v. San Pedro Peninsula Hospital, supra,* 214 Cal.App.3d at p. 618 [employer liable for employee's acts constituting intentional infliction committed within scope of employment].) None of these theories has merit based upon the undisputed evidence presented in the motion.

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intentional infliction award could not stand under the First Amendment, holding that a public figure or public official "may not recover for the tort of intentional infliction of emotional distress by reason of [a satirical] publication[] . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" (*Id.* at p. 56.) Here, plaintiffs were not public officials or public figures, did not sue for defamation, and, in pleading the intentional and negligent infliction claims, were not attempting to plead an otherwise defective defamation claim. We therefore reject Agilent's suggestion that we treat plaintiffs' intentional and negligent infliction claims as claims for defamation.

[27] The allegation in the complaint directed toward Agilent reads: "Upon information and belief, at all relevant times, Agilent was informed and knew that Moore was using its computer system to carry out these acts against [p]laintiffs. Agilent failed to terminate Moore's employment, and instead assented to his continued use of its computer system for this unlawful purpose and failed and refused to take measures to stop [Moore's] activities notwithstanding that they were contrary to Agilent's own corporate policies, thereby ratifying his tortious misconduct."

2. *Ratification*

An employer may be liable for an employee's willful and malicious actions under principles of ratification. (Civ. Code, § 2339; Rest.2d, Agency § 218.)[28] An employee's actions may be ratified after the fact by the employer's voluntary election to adopt the employee's conduct by, in essence, treating the conduct as its own. (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73; see also Judicial Council of Cal. Civil Jury Instrns. (2006) CACI No. 3710.) The failure to discharge an employee after knowledge of his or her wrongful acts may be evidence supporting ratification. (*Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal.App.3d 908, 914.)

But here there was no evidence presented in opposition to the motion for summary judgment indicative of Agilent's ratification of Moore's wrongful conduct. The facts as presented in Agilent's motion were that at the time of the initial FBI investigation in late July to mid-August, Agilent (1) had no knowledge of the substance of any e-mail or posting by Moore that was being investigated; (2) was not provided with any details by the FBI about its investigation; (3) was told by the FBI that it was not planning to arrest Moore, that it was "not after Moore's job," that Moore was not a threat to anyone, and that Agilent need not be concerned about him; (4) conducted its own investigation but did not discover evidence that Moore used Agilent's computer systems to send threatening e-mails or Internet postings; and (5) was told

[28] Employer derivative liability for employee actions need not be founded on respondeat superior, but may be based upon the doctrine of ratification. (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 852.)

by Moore that he had not used Agilent's computer systems to send any threatening e-mails or other messages. It was not until April 7, 2003 – through receipt from the FBI of the arrest affidavit – that Agilent learned the content of Moore's threatening e-mails and Internet postings that were alleged to have occurred prior to August. Agilent met with Moore shortly thereafter, at which time Moore admitted for the first time that prior to August 12, he had sent some communications through Agilent's computer systems "'that could be interpreted as a threat.'" Agilent placed Moore on administrative leave immediately after the interview and terminated him eight days later.

Based upon these undisputed facts,[29] there was no evidence that Agilent, after the fact, treated Moore's malicious conduct as its own. There was thus no triable

[29] While (as we have mentioned in pt. III sec. B, *ante*) plaintiffs claimed in their separate statement in opposition to the motion that a number of these key facts were disputed, a careful review of the supporting and opposing evidence reveals that there was no actual dispute. (See *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 616-617 [party opposing summary judgment must do more than aver that it has evidence to support cause of action, but must actually present that evidence].) For example, while plaintiffs claimed in their responsive separate statement that a dispute existed regarding UMF number 11 (i.e., that Agilent's August investigation did not disclose that Moore had used Agilent's computer systems to send any threatening e-mails or Internet postings), the evidence plaintiffs cited raised no such dispute. Rather, it consisted primarily of a reference to Pierce's August investigation in which she determined that Moore had sent two e-mails (using his own name) to Superior Court Judge Jack Komar and Captain Dennis Bacon in the Santa Clara County Sheriff's office, in which he complained about Delfino's harassment of Moore. Plaintiffs' opposition simply did not present admissible evidence of a dispute as to any matter that demonstrated Agilent's ratification of Moore's conduct.

issue as to plaintiffs' claim that Agilent ratified Moore's tortious actions.

3. *Respondeat superior*

We next evaluate plaintiffs' assertion that Agilent should be held liable for Moore's tortious conduct under the doctrine of respondeat superior. Pursuant to this doctrine, "an employer is vicariously liable for his employee's torts committed within the scope of the employment." (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967; see also CACI No. 3701.) "'A risk arises out of the employment when "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [Citations.] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer. [Citation.]"' [Citations.]" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209 (*Mary M.*); see generally 1 Levy et al., Cal. Torts (2006) § 8.03[3][a], pp. 8-19 to 8-20.3.) The plaintiff bears the burden of establishing that the employee's action for which vicarious liability is sought to be imposed was committed within the scope of the employment. (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721.)

Scope of employment in the application of the respondeat superior doctrine has been given a broad construction. (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 (*Farmers Ins. Group*).) As summarized by our high court: "'[T]he fact that an employee is

not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer.' [Citation.] Thus, acts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal and not acts of service, do not take the employee outside the scope of employment. [Citation.] Moreover, " 'where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer." [Citations.]' [Citation.] It is also settled that an employer's vicarious liability may extend to willful and malicious torts of an employee as well as negligence. [Citations.] Finally, an employee's tortious act may be within the scope of employment even if it contravenes an express company rule and confers no benefit to the employer." (*Ibid.*)

But the scope of vicarious liability is not boundless. "[A]n employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee *substantially* deviates from the employment duties for personal purposes. [Citations.] Thus, if the employee 'inflicts an injury out of personal malice, not engendered by the employment' [citation] or acts out of 'personal malice unconnected with the employment', [citation] or if the misconduct is not an 'outgrowth' of the employment, [citation] the employee is not acting within the scope of employment. Stated another way, '[i]f an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of

action against the employer under the doctrine of respondeat superior.' [Citation.] In such cases, the losses do not foreseeably result from the conduct of the employer's enterprise and so are not fairly attributable to the employer as a cost of doing business." (*Farmers Ins. Group, supra,* 11 Cal.4th at pp. 1004-1005.)[30]

Applying these principles, we find that that Moore's conduct in sending threatening e-mails and postings through the Internet were plainly outside the scope of his employment with Agilent. Even assuming that Moore used Agilent's computer system in accessing the Internet to send one or more of these messages, the injury he inflicted was "out of personal malice, not engendered by the employment." (*Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d 652, 656.) Likewise, Moore's messages of hate were not an "outgrowth" of his Agilent employment. (*Id.* at p. 657.) Using Agilent's computer system to log on to a private Internet account to send messages – threatening or otherwise – was never part of Moore's job duties. Indeed, plaintiffs did not dispute this point. Furthermore, the fact that Moore may have been present at the workplace and

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[30] Thus, in a number of instances, courts have concluded that the employer was not liable for its employee's intentional tort where the employee's act was outside the scope of his or her employment. (See, e.g., *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 297-299 (*Lisa M.*) [sexual assault by medical technician during patient examination]; *Farmers Ins. Group, supra,* 11 Cal.4th at pp. 1012-1013 [deputy sheriff's sexual harassment of subordinates]; *Hoblitzell v. City of Ione* (2003) 110 Cal.App.4th 675, 682-686 [city building inspector's harassment of builder, done as favor to inspector's friend]; *Maria D. v. Westec Residential Sec., Inc.* (2000) 85 Cal.App.4th 125 [security guard's sexual assault]; *Borg-Warner Protective Services Corp. v. Superior Court* (1999) 75 Cal.App.4th 1203, 1207-1212 [security guard's arson].)

may have been performing regular employment functions before or after transmitting one or more of the threatening messages do not transform his personal conduct into actions for which Agilent may be held vicariously liable. (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 140; see also 2 Dobbs, The Law of Torts, (2001) § 335, pp. 912-913 ["employees may depart from employment without leaving the situs of their work" . . . [¶] . . . [or] by engaging in purely personal acts during working hours"].) As the Supreme Court said in *Lisa M., supra,* 12 Cal.4th at page 306, the employer "may have set the stage for [its employee's] misconduct, but the script was entirely of [the employee's] own, independent invention." Therefore, we conclude that Agilent as a matter of law could not be held vicariously liable for Moore's cyber-threats, because he "*substantially* deviate[d] from the employment duties for personal purposes." (*Farmers Ins. Group, supra,* 11 Cal.4th at p. 1005.)[31]

Moreover, the imposition of vicarious liability upon Agilent for Moore's actions would be inconsistent with the rationale for the respondeat superior doctrine. As our high court has explained, the doctrine is based on "a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of

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[31] We acknowledge that whether the employee's conduct was within the scope of his or her employment is generally a question for the trier of fact. (*Ducey v. Argo Sales Co., supra,* 25 Cal.3d at p. 722.) But where, as here, the undisputed facts demonstrate clearly that an employee's conduct was outside of the scope of his or her employment, the issue is one of law that the court may determine. (*Lisa M., supra,* 12 Cal.4th at p. 299; *Perez v. Van Groningen & Sons, Inc., supra,* 41 Cal.3d at p. 968.)

doing business." (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959-960; see also *Johnston v. Long* (1947) 30 Cal.2d 54, 64.) Likewise, [r]espondeat superior is based on '"a deeply rooted sentiment"' that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities. [Citations.]" (*Mary M., supra,* 54 Cal.3d at p. 208.) We unhesitatingly conclude based upon the circumstances before us – i.e., an employee allegedly using his employer's computer to access his personal Internet account to send anonymous cyberthreats that are unrelated to his employment – that Moore's conduct was not a risk that Agilent bore as part of its enterprise. Agilent thus cannot be held liable for Moore's actions under respondeat superior. (See *Booker v. GTE.net LLC* (E.D.Ky.2002) 214 F.Supp.2d 746 [rejecting claim against employer under respondeat superior for employees' creation of fake e-mail address and transmission of e-mail derogatory toward the plaintiff].)[32]

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[32] The district court's holding in *Booker* that the employees' tortious acts were outside the scope of their employment was based upon the conclusion that transmission of the offensive e-mails by means of false third-party e-mail accounts "was most certainly *not* sent in furtherance of [the employer's] business," and was not a matter that was expected in light of the employees' duties. (*Booker v. GTE.net LLC, supra,* 214 F.Supp.2d at p. 750.) Certainly, a number of legal scholars have written on the subjects of employer monitoring of employees' Internet use and potential employer liability for employees' wrongful computer-related activity. (See, e.g., Echols, *Striking a Balance Between Employer Business Interests and Employee Privacy: Using Respondeat Superior to Justify the Monitoring of Web-Based, Personal Employee Electronic Mail Accounts of Employees in the Workplace,* 7 Comp. L.Rev. & Tech. J. 273, 278 (2003); Comment, *I Spy Something Read! Employer Monitoring of Personal Webmail Accounts,* 5 N.C. J.L. & Tech. 121 (2003); Comment, *The Doctrine of Respondeat Superior: An Application to Employers' Liability for the Computer or Internet Crimes Committed by Their*

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4. *Negligent supervision/retention*

"An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citation.]" (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565.) Negligence liability will be imposed upon the employer if it "knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.) As such, "California follows the rule set forth in the Restatement Second of Agency section 213, which provides in pertinent part: 'A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . [¶] (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]' (*Ibid.*)" (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 836.) Liability for negligent supervision/retention of an employee is one of direct liability for negligence, not vicarious liability. (2 Dobbs, The Law of Torts, *supra,* § 333, p. 906.)

Here, plaintiffs alleged that Agilent knew that Moore was using its computer to accomplish his cyberthreats, that it refused to terminate his employment, and that it instead failed to take measures to prevent their recurrence. Plaintiffs' negligent supervision/retention theory fails for at least three reasons.

Employees, 12 Alb. L.J. Sci & Tech. 683 (2002).) But we note from our research that, somewhat surprisingly, *Booker, supra,* is the only case addressing the issue of the imposition of vicarious liability on an employer based upon employee abuse of the Internet.

First, it is doubtful that the record supports a finding of the existence of a legal duty owing to plaintiffs by Agilent. In *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, our Supreme Court enunciated seven factors relevant to determining the existence of duty: "[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved."[33] Applying the first factor, we find that plaintiffs had no business relationship with Agilent. And there is no evidence that Moore's cyberthreats directed toward plaintiffs arose out of, or were in any way connected with his employment. The first *Rowland* factor does not suggest the existence of a duty.

Agilent argues that plaintiffs were not damaged, and plaintiffs admitted that they sought no treatment for their alleged emotional injuries. Plaintiffs argue that the outrageousness of Moore's conduct suggests they were damaged. At best, the second *Rowland* factor neither supports nor opposes a finding of duty.

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[33] Thus, for instance, the *Rowland* seven-factor test was applied by the court in *Steven F. v. Anaheim Union School Dist.* (2003) 112 Cal.App.4th 904, 915-919, to reach the conclusion that a school district could not be held liable to a student's parents under a negligent supervision theory as a result of the acts of its teacher-employee (i.e., a sexual relationship engaged in by a teacher with a student).

There was little evidence that Agilent's conduct had any "closeness" to plaintiffs' alleged injuries. At most, Agilent supplied Moore with an office computer by which its employee (unbeknownst to Agilent) accessed his personal Internet account and sent threatening messages. Thus, the third *Rowland* factor does not support a finding of duty.

Moreover, the fourth through seventh *Rowland* factors strongly disfavor liability in this instance. There was no "moral blame" in Agilent's conduct evidenced by the record. (See, e.g., *Steven F. v. Anaheim Union School Dist., supra,* 112 Cal.App.4th at p. 917 [no "moral blame" on part of school district in supervision of employee where it provided ongoing awareness programs and extensive employee training].) There is no significant policy of preventing future harm that would result from a finding of duty; indeed, a finding of duty here might have a significant chilling effect upon Internet free speech and might encourage extreme employer oversight of employee activities. (See *id.* at p. 918 [finding duty would turn the culture of the school into "a virtual police state"].) Additionally, the burden imposed on the employer in this instance would be enormous. (See *Macias v. State of California* (1995) 10 Cal.4th 844, 859-860 [in "deciding whether to expand a tort duty of care, courts must consider the potential social and economic consequences"].) It would be a dubious proposition indeed to suggest that a party, simply by virtue of engaging in business, owes a duty to the world for all acts taken by its employee, irrespective of whether those actions were connected with the enterprise in which the business was engaged. (See, e.g., *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1341 [no duty by city owed to employee's family member for employee's

off-duty criminal acts].) And it is not realistic that the type of risk involved here – unknown malicious acts of an employee bearing no relationship to his job achieved by accessing the Internet to make death threats – is a readily insurable one. Therefore, we conclude that plaintiffs did not establish here that Agilent owed a duty.

Second, even were we to assume the existence of a duty, there was no evidence that Agilent breached any duty of care with respect to the supervision or retention of Moore as an employee. As we have noted (see pt. III sec. D.2., *ante*), Agilent had no knowledge of the content of any of Moore's threatening e-mails or postings before receiving the arrest affidavit on April 7, 2003. Most important, it was not until the day Moore was placed on administrative leave (leading to his ultimate termination a few days later) that Agilent learned that Moore had used its computer systems to access his personal Internet account to send threatening messages through the Internet more than eight months earlier. Moreover, Agilent's internal investigations – one conducted in August prompted by the FBI's initial inquiry, and the second conducted after Moore's February 2003 arrest – did not yield any information that Moore had used Agilent's computer system to send inappropriate messages over the Internet. Buffington was unable to discover any Internet postings that may have been attributable to Moore. Indeed, plaintiffs – through Delfino's deposition testimony – admitted the impossibility of tracing an anonymous posting to a particular individual. There were thus no facts presented suggesting that Agilent knew or had reason to suspect that Moore was engaged in improper on-the-job conduct. (See *Federico v. Superior Court (Jenry G.)* (1997) 59 Cal.App.4th 1207, 1216 [hair-styling college not liable for employee's molestation of

juvenile son of student, where it had no knowledge or notice of inappropriate behavior at work].)

Third, even were we to assume that Agilent (1) knew or should have known that Moore (prior to August) had allegedly used its computers to send threatening e-mails and postings over the Internet, and (2) took no measures to prevent a recurrence of the threats, there was no evidence that Moore in fact used Agilent's system after August to threaten plaintiffs.[34] Thus, any negligent supervision/retention of Moore by Agilent – which alleged negligence, as we have concluded, was devoid of factual support – was not the cause of plaintiffs' claimed injuries. (See *Mendoza v. City of Los Angeles, supra*, 66 Cal.App.4th at p. 1342 [assuming evidence of negligent hiring, off-duty police officer's killing of fiancé after domestic dispute not caused by such negligence].)

Plaintiffs failed to present evidence supporting their claim based upon the theory that Agilent was negligent in its supervision and/or retention of Moore.[35]

E. *Negligent Infliction Claim*

The second cause of action was captioned as a purported negligent infliction claim. It incorporated by reference all prior paragraphs of the complaint (including the

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[34] The November cyberthreat for which Moore ultimately pleaded guilty indisputably was made without use of Agilent's computer system.

[35] As is the case with respondeat superior, while we acknowledge that negligent retention is generally a question of fact, it is one of law if no reasonable jury may conclude based upon the undisputed facts that liability exists. (*Federico v. Superior Court (Jenry G.), supra*, 59 Cal.App.4th at p. 1214.)

entire intentional infliction claim). As it pertained to Agilent, it contained the same allegations that appeared in the intentional infliction cause of action. (See fn. 27, *ante*.)

As we have noted (see fn. 4, *ante*), there is no independent tort of negligent infliction of emotional distress. (*Potter v. Firestone Tire & Rubber Co., supra*, 6 Cal.4th 965, 984.) Thus, since plaintiffs' purported negligent infliction claim was merely "a species of negligence" (*Wooden v. Raveling, supra,* 61 Cal.App.4th 1035, 1046), the better question to ask in appraising plaintiffs' so-called "negligent infliction" allegations is: "What are the circumstances under which a plaintiff can recover damages for emotional distress as a matter of the *law of negligence?*" (*Lawson v. Management Activities, Inc., supra,* 69 Cal.App.4th 652, 657, original italics.)

Using this analytical framework, we have established from our discussion of negligent supervision/retention (see pt. III sec. D.4., *ante*) the nonviability of plaintiffs' purported negligent infliction claim. The claimed negligence pertained to Agilent's retention and supervision of its employee, Moore. As we have discussed, the undisputed evidence showed that plaintiffs did not establish the existence of duty, breach of duty or causation. Accordingly, summary disposition of plaintiffs' purported negligent infliction claim was proper.[36]

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[36] For the first time on appeal, plaintiffs argue that Agilent is subject to negligence liability under the theory that – as an extension of the *Tarasoff* (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425) doctrine involving a psychotherapist's duty to warn a potential victim of foreseeable injury caused by a patient – Agilent had a duty to warn plaintiffs under the USA Patriot Act (P.L. 107-56, 115 Stat. 272). We need not address this dubious theory; it is inappropriate

(Continued on following page)

DISPOSITION

The judgment entered on the order granting Agilent's motion for summary judgment is affirmed.

Duffy, J.

WE CONCUR:

Bamattre-Manoukian,
Acting P.J.

McAdams, J.

Trial Court:	Santa Clara County Superior Court No. 1-03-CV-001573
Trial Judge:	Hon. Kevin E. McKenney
For Plaintiffs and Appellants:	Michelangelo Delfino, in pro. per.; Mary E. Day, in pro.
Attorneys for Defendant and Respondent:	Bradford K. Newman Katherine C. Huibonhoa Shannon S. Sevey PAUL, HASTINGS, JANOFSKY & WALKER

for plaintiffs to adopt a new theory for the first time on appeal, and appellate courts will customarily decline to decide such newly minted theories. (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn. 9; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820.)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

MICHELANGELO DELFINO, et al., Plaintiffs, vs. CAMERON ALDEN MOORE, et al., Defendants.	Case No. 1-03-CV 001573 ORDER RE: MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION (Filed Mar. 18, 2005)

The Motion for Summary Judgment or Adjudication by defendant Agilent Technologies, Inc. came on for hearing before the Honorable Kevin E. McKennev on March 17, 2005, at 9:00 a.m. in Department 16. The matter having been submitted, the Court finds and orders as follows:

The court declines to render formal rulings on the evidentiary objections, but has disregarded all inadmissible and incompetent evidence in ruling herein. See *Biljac Assoc. v. First Interstate Bank or Oregon* (1990) 218 Cal.App.3d 1410.

Agilent's request for judicial notice is granted as to the sentencing memorandum, but not for the truth of the matter asserted therein, and denied as to the purported plea agreement.

Plaintiffs' request for judicial notice is granted as to the amended judgment, and denied as to the reporter's transcript.

The motion for summary judgment is granted. Agilent established that it is immune from liability under 47 U.S.C. § 230(c)(1) (See, e.g. Rolfe Dec. ¶ 8; Agilent's Separate Statement of Undisputed Material Facts, Fact Nos. 2-24), and plaintiffs failed to raise a triable issue of material fact in regard thereto.

Dated: March 17, 2005 /s/ _____
Kevin E. McKenney
Judge of the Superior Court

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

CASE #: 1-03-CV-001573

PLAINTIFF: MICHAELANGELO DELFINO, et al.

DEFENDANTS: CAMERON ALDEN MOORE, et al.

PROOF OF SERVICE OF: **ORDER RE: MOTION FOR SUMMARY JUDGMENT**

CLERK'S CERTIFICATE OF MAILING

(Filed Mar. 18, 2005)

I CERTIFY THAT I AM NOT A PARTY TO THIS CAUSE AND THAT A TRUE COPY OF THIS DOCUMENT WAS MAILED FIRST CLASS POSTAGE PREPAID IN A SEALED ENVELOPE ADDRESSED AS

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IN THE SUPREME COURT OF CALIFORNIA

En Banc

MICHAELANGELO DELFINO et al.,
Plaintiffs and Appellants,

v.

AGILENT TECHNOLOGIES, INC.,
Defendant and Respondent.

(Filed Feb. 28, 2007)

Petition for review DENIED.

Chin, J., was recused and did not participate.

GEORGE
Chief Justice

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(2)

No. 06-1561

FILED
JUN 25 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MICHELANGELO DELFINO AND MARY E. DAY,

Petitioners,

v.

AGILENT TECHNOLOGIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are employers categorically excluded from the definition of an "interactive computer service" set forth in the Communications Decency Act of 1996 ("CDA") — *i.e.*, "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions"? 47 U.S.C. § 230(f)(2).[1]

---

1. The two other questions supposedly presented in the Petition For A Writ Of Certiorari ("Petition") in fact are not. *See* Reasons for Denying the Petition, Section I *infra*.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Agilent Technologies, Inc. ("Agilent" or the "Company"), has no parent corporation and no publicly held company owns 10% or more of its stock.

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141 Cong. Rec. H8460-01 (Aug. 4, 1995) 11

STATEMENT OF THE CASE

The California court of appeal opinion below well sets forth the factual background of the case. (Petition Appendix ("Pet. App.") 6-11.)

Agilent does not contest the accuracy of Petitioners' factual statement of the case (Pet. 6-9), except as follows:

1. Agilent never identified Cameron Moore as "the user of the Agilent IP address from which emails had been sent by 'crack_smoking_jesus.'" (Pet. 8.) On July 30, 2002, Agilent provided information to the FBI identifying Moore as the user of the IP address associated with the alias "drcamster." (CT 366-67, 431-32, 739, 833-34.) Similarly, on August 2, 2002, Agilent provided information to the FBI identifying Moore as the user of the IP address associated with the alias "dr_dweezil2001." (CT 370.) The FBI did not share any information about the content of the emails or postings in question. (CT 366-68, 370, 431-32, 739, 833-34.)

2. On July 30, 2002, the FBI told Agilent for the first time that Delfino and Day had complained to the FBI that they had received some potentially threatening e-mails appearing to come from Moore. (Pet. 8.) The FBI did not share any information about the content of the messages in question, or indicate that any of the messages had been sent through Agilent's computer systems. (CT 366-68, 431-32, 739, 833-34.) During that same conversation, Agilent told the FBI that it would cooperate fully in the investigation. (*Id.*) The FBI thanked Agilent for its cooperation, and reassured Agilent that it was not planning to arrest Moore, was not after his

job, and did not consider him to be dangerous. (*Id.*) Agilent specifically asked the FBI whether "Moore was a threat to anyone and whether Agilent should be concerned about him," to which the FBI responded, "no." (*Id.*) The FBI said only that it wanted to speak with Moore and resolve the situation. (*Id.*)

3. On August 12, 2002, Moore provided Agilent with a copy of an August 6, 2002 letter that he had sent to the United States Attorney's Office in which he admitted to threatening Delfino. (Pet. 8.) In that letter, Moore did not admit to using Agilent's systems to transmit any threats. (CT 373, 392, 553-62.) Moreover, during Agilent's meeting with Moore earlier in the day on August 12, he specifically denied sending any threats to Delfino and Day through Agilent's systems. (Pet. 8; *see also* CT 372, 389-90, 427, 431-32, 592-95, 740-42, 794.)

4. Agilent's further investigation in August 2002 showed that in July 2002, Moore used Agilent's computer system to access the Internet and visit the Yahoo! message board for one of the Varian corporate plaintiffs. (Pet. 8.) On at least some dates in July 2002 when Moore visited the Yahoo! message board for one of the Varian corporate plaintiffs, threatening postings under the alias "crack_smoking_jesus" appeared. (*Id.* 9.) To the extent that the Petition suggests that Agilent was or should have been aware of the threatening content of any postings that Moore made on the Yahoo! message board for one of the Varian corporate plaintiffs under the alias "crack_smoking_jesus," it misrepresents the record. While Agilent's computer systems are able to track when an employee logs onto the Internet and when that employee logs onto a personal e-mail account or visits an Internet message board, the systems cannot track the content or recipient(s)

of e-mails the employee then may choose to send or the content of particular postings the employee then may choose to make. (CT 388 ("However, other than demonstrating that Moore was logging onto his Yahoo! email account under the alias 'Dreamster,' there was no way to tell what email messages, if any, he had sent, or to whom."); *see also* CT 362, 377, 378, 389.) Agilent was not aware of the content of postings that Moore made before August 12, 2002, until April 7, 2003, when the government finally provided it with a copy of the FBI's Criminal Complaint Affidavit against Moore. (CT 377, 401, 411.)

5. In late October 2002, Agilent reviewed postings on the Yahoo! message board for Agilent claiming that "death threats" were "traced to" or coming "from inside" Agilent. (Pet. 9 (citing CT 393, 597-98).) To the extent that the Petition suggests that these postings placed Agilent on notice of Moore's actual misconduct, as opposed to Petitioners' own speculation, it misrepresents the record. These postings concerned Petitioners' conjecture as set forth in their book, *Be Careful Who You SLAPP*, released in December 2002, and on their website, *www.mobeta.com*. (CT 393, 597-98.)

6. The Petition states that "[f]ollowing the August 2002 investigations, Moore continued to threaten Delfino and Day via pseudonymous Internet postings, despite his promise to the federal prosecutor to cease doing so." (Pet. 9.) This misstates the record; the cited reference is to a letter from Petitioners' attorney to the United States Attorney's Office enclosing "copies of recent message-board postings that *I believe* might have been made by one or both of the same perpetrators who have previously made threats under the pseudonyms 'crack_smoking_jesus,' 'fifthforeseman_2002' and others. Several of the new postings are threatening." (CT 1131-32 (emphasis added).)

Agilent does not dispute the accuracy of Petitioners' account of the proceedings below (Pet. 10-11), but adds the following additional information:

1. The California court of appeal affirmed the trial court's grant of summary judgment on the basis of CDA immunity. (Pet. App. 22-23.)

2. In the alternative, the California court of appeal held that even if Delfino and Day's claims are not barred by the CDA, summary judgment nevertheless was proper because there is no triable issue as to either intentional infliction of emotional distress or negligent infliction of emotional distress.

3. As to the claim for intentional infliction of emotional distress, the court of appeal found no triable issue of liability as to Agilent for Moore's conduct under a ratification, *respondeat superior*, or negligent supervision/ retention theory, as follows:

a. *Ratification*: The court of appeal found the factual record to be undisputed[2] that Agilent did not know about the content of threatening messages Moore allegedly sent prior to August 2002 until it received the FBI arrest affidavit on April 7, 2003; that Agilent shortly thereafter confronted Moore, who admitted for the first time that prior to August 12, 2002, he sent some communications through Agilent's computer systems "that could be interpreted as a threat" (recanting his prior statement to Agilent on August 12 that

2. The court of appeal on multiple occasions countered Petitioners' claim that material facts were disputed, expressly finding that their "improperly spliced" evidence "did not support their assertions." (Pet. App. 11 & nn.15, 29.)

he had not used Agilent's computer systems to send any threatening messages); and that Agilent immediately placed Moore on administrative leave and then terminated him. (Pet. App. 27-28.) There thus is no triable question of ratification. (*Id.*)

b. *Respondeat superior liability*: The court of appeal found that Moore's conduct in sending threatening e-mails and postings, even assuming he did so from Agilent's computer systems, was "plainly outside the scope of his employment with Agilent." (Pet. App. 31.) There thus is no triable question of *respondeat superior* liability. (*Id.* 33.)

c. *Negligent supervision/retention*: The court of appeal held that this claim fails for three independent reasons. First, Agilent owed no legal duty to Delfino and Day. (Pet. App. 35-37.) Second, even assuming Agilent owed a duty of care to Petitioners, there was no breach. (*Id.* 37-38 ("There were thus no facts presented suggesting that Agilent knew or had reason to suspect that Moore was engaged in improper on-the-job conduct.").) Third, even assuming *arguendo* the existence of a duty and breach thereof, there is no triable question of causation because there is no evidence that Moore in fact used Agilent's systems to threaten Delfino or Day after August 12, 2002 (when he was issued a stern warning by Agilent): "Thus, any negligent supervision/ retention of Moore by Agilent — which alleged negligence, as we have concluded, was devoid of factual support — was not the cause of plaintiffs' claimed injuries." (*Id.* 38.)

4. As to the claim for negligent infliction of emotional distress, the court of appeal analyzed it as a negligence claim and held that it fails for the same reasons as the negligent supervision/retention theory: "As we have discussed, the

undisputed evidence showed that plaintiffs did not establish the existence of duty, breach of duty or causation." (Pet. App. 38-39.)

REASONS FOR DENYING THE PETITION

I. THE FIRST AND THIRD "QUESTIONS PRESENTED" ARE NOT ACTUALLY PRESENTED IN THIS CASE.

A. The First Question — Whether Section 230 Provides Immunity From Both Distributor As Well As Publisher Liability — Is Not Actually Presented In This Case.

Petitioners submit that this case presents the question of whether the CDA immunizes providers and users of an interactive computer service from traditional publisher liability as well as notice-based distributor liability. Petitioners, in other words, seek review of the issue in the seminal case *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), and its progeny. *See Zeran*, 129 F.3d at 331, 332 (CDA immunity is broad and protects both publishers and distributors).

For a case to present the question of whether CDA immunity extends to distributors with notice, however, it must (at a minimum) involve the underlying subject, *i.e.*, a distributor with notice. This is not such a case. As the California court of appeal below concluded, Agilent as a factual matter had no knowledge of Moore's misconduct prior to April 2003, after which it immediately suspended him and then terminated his employment. (Pet. App. 27-28.)

Thus, even assuming *arguendo* that the first tendered question were answered in favor of Petitioners — *i.e.*, that distributors with notice are excluded from the CDA — the result of this case would be exactly the same. The court of appeal below correctly recognized this and noted that Agilent is immune under the CDA "*irrespective* of whether it is deemed to have been a publisher or distributor." (Pet. App. 23 n.25 (emphasis added).)

This case thus does not even present the first question Petitioners tender.[3]

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3. Review of first question would not be warranted at this time in any event. The claimed "split" in authority is illusory: Every single court to have considered and ruled on the issue has followed *Zeran* and held that CDA immunity is broad and extinguishes traditional publisher as well as notice-based liability. *See Batzel v. Smith*, 333 F.3d 1018, 1027 n.10 (9th Cir. 2003) ("[E]very court to reach the issue has decided that Congress intended to immunize both distributors and publishers."), *cert. denied*, 541 U.S. 1085 (2004). The Petition so acknowledges (Pet. 16), but claims that there is a "split" in authority because there is some debate over whether the *Zeran* interpretation is correct. (Pet. 16-18 (relying on *dictum* in *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003), and a dissent in *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001), that are critical of *Zeran*).) This debate does not constitute a "split" in authority warranting this Court's review. (*See* Pet. App. 16-17 n.22 ("The Seventh Circuit Court of Appeals has acknowledged that there is no appellate decision contrary to *Zeran*'s holding that section 230(c)(1) affords immunity to web hosts and other Internet service providers for state-law claims based upon offensive material created by others and published over the Internet. The *Doe* court, however, recognized that there was a theoretical debate on the issue and concluded that it did not need to decide the question.").) Were it otherwise, every decision that has generated any comment or dissent (to wit, most every decision), would warrant review.

B. The Third Question — Whether CDA Immunity Encompasses "Non-Publication" As Well As Publication Torts — Is Not Actually Presented In This Case.

The third tendered question goes well beyond the specific facts and holding of the instant case — which is premised entirely on Moore's threatening e-mail messages and Internet postings, and Agilent's resulting liability (if any) — and thus does not involve any "non-publication" conduct. The third question thus is not even presented here.[4]

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4. The court of appeal below in any event correctly followed the prevailing view that CDA immunity applies to a host of claims, and is not limited to publication-based torts. (Pet. App. 20-21.) Petitioners contend that there is a "split" in authority as to this question; as with the first question, however, the claimed "split" is non-existent. Petitioners rely on *Zeran* and *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002), for the proposition that the CDA is limited to publication-based torts. (Pet. 24.) Neither case supports the claimed assertion; *Zeran* happened to involve a defamation theory (pleaded as emotional distress claims), while *Gentry* applied CDA immunity to plaintiff's claims for negligence, unfair competition, and violation of a state statute regarding the authenticity of sports memorabilia. Indeed, courts have applied CDA immunity to a wide variety of claims and conduct. *See, e.g., GTE*, 347 F.3d 655 (claims under 42 U.S.C. section 1983 and for negligent entrustment of a chattel); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 848-49 (W.D. Tex. 2007) (negligence for failing to prevent sexual predators from communicating with minors on-line); *Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 698 (N.D. Ill. 2006) (housing discrimination); *Assoc. Bank-Corp. v. Earthlink, Inc.*, No. 05-C-0233-S, 2005 WL 2240952, at *4 (W.D. Wis. Sept. 13, 2005) (tortious interference with business relations, negligence, fraud).

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER LAW.

The second tendered question — whether the CDA categorically excludes employers from its definition of an "interactive computer service" — thus is the only question actually presented in this case. As set forth below, review of this question is not warranted.

A. Review At This Time Would Be Premature.

No other federal or state court has addressed the precise question of whether an employer who provides its employees with Internet access through servers may be an "interactive computer service" provider under the CDA (or whether, as Petitioners contend, an employer-exclusion somehow can be read into the CDA's broad definition). Review thus is not needed to resolve or settle any conflicts of authority on this particular issue.

Indeed, the lack of other considered views on the issue advises against review. CDA case law has developed steadily since the statute was enacted in 1996, and will continue to develop. The prudent course is to wait for other courts to contemplate this question in a variety of factual and legal contexts and to offer their opinions. Courts already have found a broad range of services to be "interactive computer service" providers (*see* section II.B.2 *infra*), and certainly will continue to expand and develop these interpretations, including whether the definition includes employers who provide their employees with Internet access. Conflict may never arise; if one later does, that would be the time for this Court's review.

B. The Decision Below In Any Event Correctly Applied Established Principles Of CDA Law To The Facts Of The Case.

While the California court of appeal decision below was the first to address the specific question of whether an employer may be an "interactive computer service" provider under the CDA, it did little more than apply established CDA principles to the specific facts and parties in this case. The decision in many respects is unremarkable; it is fully consistent with the legislative history and plain language of the CDA, as well as with other state and federal courts' uniformly broad interpretation of the CDA. Petitioners would read an employer-exclusion into the plain language of the CDA — thereby creating a "split" in authority which they claim warrants review (Pet. 20) — but this finds no support in the text or history of the CDA, and in fact would frustrate the goals of CDA immunity.

1. The decision below is fully consistent with the legislative history and intent of the CDA.

CDA immunity was designed to achieve two goals. (*See* Pet. App. 13-14.) First, recognizing that the Internet has "flourished" "with a minimum of government regulation," Congress sought to maintain "a free market" for interactive computer services "unfettered by Federal or State regulation." 47 U.S.C. § 230(a), (b). Second, Congress sought to encourage Internet service providers to self-regulate offensive content without the "specter of liability" for taking an active role in screening. *Id.*; *Zeran*, 129 F.3d at 331.[5]

5. *Accord Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (discussing the CDA's "two ostensibly competing purposes"; (Cont'd)

Consistent with these dual purposes — freedom of expression and self-regulation — section 230 was intended to confer broad protection to those who provide access to the Internet and who are in a position to filter or screen content created by others. As Representative Cox, one of the sponsors of section 230, explained during debate on the proposed section: Section 230 "will protect computer Good Samaritans, online service providers, *anyone who provides a front end to the Internet. . . .*" 141 CONG. REC. H8460-01 (Aug. 4, 1995) (statement of Rep. Cox) (emphasis added).

Protecting employers, such as Agilent, who provide their employees with access to the Internet and who take steps that they can to monitor content is fully consistent with the purposes of the CDA. Indeed, the House Conference Report expressly states that the definition of "interactive computer service" includes employers:

> The conference agreement adopts the House provision with minor modifications as the new section 230 of the Communications Act. . . . These protections apply to all interactive computer services, as defined in new subsection 230(e)(2), *including non-subscriber systems such as those operated by many businesses for employee use.*

H.R. REP. No. 104-458, Second Session, *appearing at* 142 CONG. REC. H1078-03 (Jan. 31, 1996) (emphasis added);

(Cont'd)

"So, even though the CDA overall may have had the purpose of restricting content, there is little doubt that the Cox-Wyden amendment, which added what ultimately became § 230 to the Act, sought to further First Amendment and e-commerce interests on the Internet while also promoting the protection of minors.") (citation omitted).

see also Eric M.D. Zion, *Protecting the E-Marketplace of Ideas by Protecting Employers: Immunity for Employers Under Section 230 of the Communications Decency Act*, 54 Fed. Comm. L.J. 493, 496 (2002) ("[I]t is evident from the language and legislative history of the Act that Congress intended employers to be covered under § 230.").

Section 230 thus was intended to confer immunity to all Internet intermediaries, including employers who provide their employees with Internet access. The decision below correctly so held, and requires no review.

2. The decision is fully consistent with the plain language and broad interpretation of the CDA.

Consistent with its broad intent, the CDA contains a broad definition of an interactive computer service:

> The term . . . means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service of system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. § 230(f)(2). *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (courts treat section 230 "immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service'"); *Batzel*, 333 F.3d at 1029 ("[T]he definition of 'interactive computer service' on its face covers '*any*' information services or other systems, as long as the service or system allows 'multiple users' to access 'a computer server.'") (citing

section 230; emphasis in original); *id.* at 1030 n.15 ("Other courts construing § 230(f)(2) have recognized that the definition includes a wide range of cyberspace services, not only internet service providers.").

As the court of appeal below recognized (Pet. App. 17-20), courts construing section 230(f)(2) thus have found a wide range of entities to be "interactive computer service" providers — from companies whose business is to provide access to the Internet,[6] to search engines who facilitate access to information once connected to the Internet,[7] to for-profit websites,[8] and to not-for-profit websites.[9] Courts also have

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6. *E.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997) (AOL); *Assoc. Bank-Corp. v. Earthlink, Inc.*, No. 05-C-0233-S, 2005 WL 2240952, at *4 (W.D. Wis. Sept. 13, 2005) (Earthlink, an internet service provider).

7. *E.g.*, *Langdon v. Google*, 474 F. Supp. 2d 622, 631 (D. Del. 2007) (Google, Yahoo!, Microsoft); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (Google); *Barnes v. Yahoo! Inc.*, Civ. 05-926-AA, 2005 WL 3005602, at *2 (D. Or. Nov. 8, 2005) (Yahoo!).

8. *E.g.*, *Universal Comm'cns Syst. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (operator of financial website and associated message board); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 & n.7 (2002) (on-line auction site); *Carafano*, 339 F.3d at 1124 (on-line dating service); *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1039 (N.D. Cal. 2004) (company that collects complaints of unsolicited commercial emails from customers and forwards them to internet services providers); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40, 108 Wash. App. 454 (Wash. Ct. App. 2001) (online bookstore).

9. *E.g.*, *Batzel*, 333 F.3d at 1021 (museum security website dedicated to discussions of museum security and stolen art); *Hy Cite*

(Cont'd)

found individually-run web-based logs ("blogs")[10] and bulletin boards and other information-sharing websites[11] to qualify as "interactive computer service" providers. Finally, courts have found entities who provide computer service to access the Internet — like Agilent here — to fall within the "interactive computer service" definition.[12]

The decision below is fully consistent with these precedents. An employer like Agilent, which enables computer access by multiple users to a computer service, including access to the Internet, satisfies the both the letter

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Corp. v. badbusinessbureau.com LLC, 418 F. Supp. 2d 1142 (D. Ariz. 2005) (website allowing consumers to post consumer complaints); *Roskowski v. Corvallis Police Officers' Ass'n*, Civ. 03-474-AS, 2005 WL 555398, at *11 (D. Or. Mar. 9, 2005) (website maintained by police officer association as a forum to exchange ideas regarding the police chief); *Whitney Infor. Network, Inc. v. Xcentric Venture, LLC*, 199 Fed. Appx. 738, 739 (11th Cir. 2006) (consumer watch website where consumers post complaints).

10. *E.g.*, *Dimeo v. Max*, 433 F. Supp. 2d 523, 524 (E.D. Pa. 2006) (website run by an individual who wanted to "'share [his] adventures with the world'") (citation omitted; alteration in original).

11. *E.g.*, *Doe v. MySpace, Inc.*, 474 F. Supp. 2d at 848 (company providing "a forum for the exchange of information between third party users"); *Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 698 (N.D. Ill. 2006) (community information-sharing website); *Donato v. Moldow*, 865 A.2d 711, 718 (N.J. Super. Ct. App. Div. 2005) (community bulletin board devoted to discussion of local government activities).

12. *E.g.*, *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 692 (2001) (library providing computers with Internet access); *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001) (copy shop renting computers with Internet access).

and spirit of the CDA's "interactive computer service" definition. *See Reno v. ACLU*, 521 U.S. 844, 851 (1997) (interpreting the CDA and noting that methods of accessing the Internet include connections and networks provided by businesses); Ian C. Ballon, *IP And Internet Litigation: Law And Developing Trends*, Practising Law Institute, 691 PLI/ Pat 245, 348 (March 7-8, 2002) ("The definition of 'interactive computer service' is broad enough to encompass any computer network, including an employer's computer network or intranet.") (citing 47 U.S.C. § 230(f)(2)); Caitlin Garvey, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology*, 25 U. Dayton L. Rev. 133, 139 (1999) ("Corporations with direct Internet connections meet the functional definition of an ISP. . . . [C]orporations with direct Internet connections are indeed ISPs and, therefore, should receive immunity from employee computer abuse.").

3. Petitioners' attempt to graft limitations onto the plain language of section 230 is not supported by the statutory language or intent.

Petitioners contend that the CDA's statutory language somehow should be read to carve out employers. (Pet. 20-23.) This argument is completely at odds with the plain language and intent of the CDA, and does not warrant review.

Delfino and Day point out that nothing in the CDA evinces an intent to *include* employers within the definition of an "interactive computer service." But this improperly presumes that the some sort of enumeration is required. It is not; where (as here) the statutory language is broad and inclusive, it is unnecessary for a legislature to give examples of covered entities. *Park 'N Fly, Inc. v. Dollar Park & Fly,*

Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").[13]

Petitioners nevertheless urge that an employer-exclusion should be read into the CDA's plain language. They argue that Congress somehow intended the broad "interactive computer service" definition to be limited to entities that are "in the business" of the Internet, and that protecting employers under the CDA would frustrate the statutory goals. (Pet. 21-22.) The statutory language, however, makes clear that Congress valued the Internet as a forum for freedom of expression, and wanted to promote access to it by protecting *all* Internet intermediaries. Congress found, among other things:

> The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

47 U.S.C. § 230(a)(1).

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13. In an attempt explain away the broad statutory language, Petitioners argue that Congress in 1996 could not have contemplated that employers would figure so prominently as providers of Internet access and so did not specifically exclude them. (Pet. 21.) This claim is squarely belied by both common sense (it was well known before 1996 that most employers' computer systems permitted Internet access), and the legislative history, which expressly includes employers who provide Internet access to their employees within the "interactive computer service" definition. (*See* section II.B.1 *supra*.)

> The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

Id. § 230(a)(3).

> Increasingly, Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

Id. § 230(a)(5). Consistent with these findings, one purpose of the CDA is to "promote the continued development of the Internet and other interactive computer services and other interactive media." *Id.* § 230(b)(1).

There is simply no basis for Petitioners' suggestion that employers who act as Internet service providers are differently positioned with respect to section 230 than any other Internet service provider. When an employer provides its employees with Internet access, the relationship is analogous to that between business-and-customer or library-and-public.[14] Employees use employer-provided Internet to engage in the myriad of valuable activities Congress referenced when enacting the CDA; employers like Agilent satisfy both purposes of the CDA by enabling that activity and taking steps that it can to monitor offensive content. *See ACLU v. Reno*, 929 F. Supp. 824, 832-33 (E.D. Pa. 1996) ("Similarly, Internet resources and access are sufficiently important to many corporations and other employers that

14. Of course, with respect to the employer *qua* employer, the employer-employee relationship has particular characteristics and obligations that the CDA does not abrogate or affect.

those employers link their office computer networks to the Internet and provide employees with direct or modem access to the office network (and thus to the Internet). Such access might be used by, for example, a corporation involved in scientific or medical research or manufacturing to enable corporate employees to exchange information and ideas with academic researchers in their fields."), *aff'd*, 521 U.S. 844 (1997); *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 913 (D. Or. 1999) ("[M]any corporations and other employers link their office networks to the Internet, thus providing their employees with direct or modem access to the Internet. . . . The World Wide Web ('The Web') is the most well-known and advanced method of locating and retrieving information on the Internet. . . . The Web contains information from a variety of sources and is accessible to Internet users around the world.") (citations omitted).

If anything, the rise of employer-provided Internet access — which the Petition describes in some detail (Pet. 14) — only underscores the importance of employers as Internet intermediaries and, correspondingly, that Congress correctly included them within the CDA's broad protection. This is because employers as a class — perhaps now more than any other single category — provide a large number people with access to the Internet, which directly promotes the growth of the Internet. *See* Mark Ishman, *Computer Crimes and the Respondeat Superior Doctrine: Employers Beware*, 6 B.U. J. Sci. & Tech. L. 6 (2000) ("One of several reasons for the Internet's phenomenal growth is that the Internet is accessible from anywhere (e.g., at the office, home, and while traveling). In addition, electronic mail ('e-mail') and Internet use in the workplace have experienced tremendous growth in the last five years. Consequently, the workplace has become increasingly dependent on the Internet, and this dependence

will continue through the new Millennium. The benefits produced by using the Internet and e-mail in the workplace are impressive.") (footnotes omitted); Nat'l Telecommc'ns & Info. Admin., *Falling through the Net: Defining the Digital Divide*, part II.B.2 (1999), *http://www.ntia.doc.gov/NTIAHOME/FTTN99/part2.html* ("By far the most popular place to access the Internet outside the home is at work. Of those who access the Internet outside of home, more than half (56.3%) of Americans access it at work . . . .").

Additionally, because employers as a class are responsible for providing Internet access to so many people, excluding employers from the definition of an "interactive computer service" (as Petitioners urge) also would frustrate the CDA goal of self-regulation. Employers, like any other Internet service provider, are able to take steps to monitor offensive content, and likewise are incentivized by the CDA to do so without the "specter of liability" for their actions. *Zeran*, 129 F.3d at 331.[15]

In sum, the language and intent of the CDA are broad, and manifestly encompass employers, as the court of appeal below correctly concluded. Petitioners' arguments — which fly in the face of the plain statutory language and intent — present no issue for review.

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15. Petitioners contend that immunizing employers would encourage employers to do nothing to monitor or screen offensive content. (Pet. 22-23.) In enacting section 230, however, Congress determined that conferring immunity would encourage self-regulation — not the opposite. *Zeran*, 129 F.3d at 331 ("Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity 'to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.'") (citing 47 U.S.C. § 230 (b)(4)).

III. THERE ARE SEVERAL ALTERNATIVE GROUNDS FOR SUMMARY JUDGMENT

Review also should be denied because it would be pointless. Even if review were to be granted, and even if the Court were to agree with all of Petitioners' contentions regarding the CDA, the result of this case would not change because there are several alternative, state-law grounds for affirming the trial court's grant of summary judgment.

A. The Decision Below Correctly Rests On Several Alternative State-Law Grounds.

The California court of appeal below parsed the voluminous record (including Delfino and Day's "improperly spliced" evidence), and made clear multiple times in its decision that there is no triable question as to Delfino and Day's claims for intentional and negligent infliction of emotional distress. (Pet. App. 11 & nn.15, 29.) The court of appeal found the record to be uncontroverted that Agilent did not know, and had no reason to know, of Moore's misconduct prior to August 12, 2002; that Agilent nevertheless confronted Moore on August 12, during which he denied using Agilent's systems to send any threats; that Agilent first learned that Moore may have send threatening messages though its systems when it received the FBI arrest affidavit on April 7, 2003 and confronted Moore, who recanted his prior denial; and that immediately thereafter Agilent place Moore on administrative leave and then terminated his employment. (Pet. App. 6-11, 27-28, 37.)

The decision below analyzed the claim for intentional infliction of emotional distress and correctly concluded that summary judgment was proper under each of Petitioners'

theories of liability (*i.e.*, ratification, *respondeat superior*, and negligent retention/supervision). (*See* Statement of the Case, *supra*.) The court of appeal also correctly concluded that summary judgment is appropriate for the negligent infliction of emotional distress claim because there is no triable question of duty, breach, or causation. (*Id.*) These independent, state-law grounds supporting the summary judgment counsel against review.

Petitioners claim that the decision below is not supported by adequate and independent state-law grounds. (Pet. 24-26.) Specifically, Petitioners contend that a different CDA interpretation would alter the court of appeal's findings that Agilent owed no duty of care to Delfino or Day, and that there was no breach of any duty in any event. (*Id.*) This argument is precisely backwards. The existence of a substantive duty of care, and the standards for its breach, are dictated by state law. Section 230 of the CDA is designed to encourage interactive computer services to self-regulate content, but does not impose any duty to do so, and so does not inform state negligence law. Here, the court of appeal below correctly concluded that Agilent did not owe any duty to Petitioners under California state law. (Pet. App. 35-37.) Changing the CDA holding below would not alter this result.[16]

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16. *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) — upon which Petitioners rely in support of their first tendered question (*see* note 3 *supra*) — makes clear that the state-law analysis is wholly independent of the CDA analysis. In *Doe*, the court affirmed CDA immunity for the communications company defendant who merely provided Internet access and web hosting services to companies that, in turn, sold illicit videotapes. *Id.* at 659. The court went on to question in *dictum* whether permitting the CDA to immunize knowing

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B. There Are Other Alternative State-Law Grounds For Summary Judgment That The Court Of Appeal Did Not Reach.

Agilent set forth at least two additional grounds for summary judgment, which the court of appeal below did not address. These arguments also independently support the result reached below.

1. The claim for intentional infliction of emotional distress fails because there is no triable issue of intent.

To establish intent as required to make out a *prima facie* of intentional infliction of emotional distress, Delfino and Day also must show that Agilent intended "to inflict injury or engaged in [conduct] with the realization that injury will result." *See Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991) (citation omitted). Moreover, Delfino and Day must demonstrate that Agilent's "outrageous" conduct was directed primarily at them. *See id.* at 903-06 (1991); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1002 (1993). Alternatively, Delfino and Day must establish that Agilent was aware of Delfino and Day's presence at the time of the "outrageous" conduct, and acted

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distributors who might otherwise be liable under state laws that impose a duty on interactive service providers to protect third parties, was consistent with the CDA's goals. *Id.* at 660. The court ultimately concluded that it did not need to reach the question because Illinois in that case — like California here — imposes no such duty and, therefore, that the possible inconsistency was not actually presented. *Id.* ("We need not decide which understanding of § 230(c) is superior, because the difference matters only when some rule of state law *does* require ISPs to protect third parties who may be injured by material posted on their services.").

with reckless disregard of the probability that Agilent's conduct would cause Delfino and Day severe emotional distress. *See Christensen*, 54 Cal. 3d at 903-06; *Potter*, 6 Cal. 4th at 1002.

There is no triable issue of intent here under either formulation. The undisputed facts demonstrate that Agilent never had any intent to cause, and never acted in reckless disregard of causing, Delfino and Day to suffer emotional distress. Indeed, Agilent at all times took reasonable steps to investigate and warn against Moore's alleged activities, did in fact stop him from using Agilent's systems to transmit threatening messages after August 12, 2002, and ultimately terminated Moore once it had the necessary evidence of misconduct.

2. Even if there were a triable issue of negligence, assumption of the risk applies as a defense.

"The defense of assumption of risk is available when there has been a voluntary acceptance of a risk, and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk." *Morton v. Cal. Sports Car Club*, 163 Cal. App. 2d 685, 688 (1958). Assumption of risk is a complete defense to a negligence claim. *See id.*

Here, Delfino and Day assumed the risk when they voluntarily, regularly, and repeatedly clicked onto Yahoo!'s and other Internet message boards about Varian to read every posting. Delfino and Day could have decided not to read postings directed at them, and/or clicked the "Ignore this User" option to avoid reading the postings, and thus not subject themselves to any threats or harassment. (CT 432, 704, 849.) Since Delfino and Day opened and read postings, they assumed the risk of any

alleged emotional distress that resulted from them. Moreover, Delfino and Day provoked the alleged threats in the first instance by engaging in what the United States Attorney found to be "provocative conduct" (CT 434, 925, 1792), and "infantile behavior which enraged Moore with many other individuals on Internet posting message boards." (CT 434, 927, 1792.)

CONCLUSION

The Petition should be denied. The court of appeal decision below does not present any legal issue that is worthy of review at this time (if at all). The decision in fact is fully consistent with the CDA's intent and plain language, and with courts' uniformly broad interpretation of its scope. Moreover, even setting aside the issue of CDA immunity and considering Petitioners' claims on their merits, review would be pointless because, as the court of appeal correctly found, summary judgment rests on several, alternative and independent state-law grounds.

Respectfully submitted,

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